Supreme Court, U.S.
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JAY SHELDON FICHTNER,
Petitioner

v.

THE STATE OF TEXAS
Respondent

On Petition for Writ of Certiorari
To
The Court of Criminal Appeals of Texas,
The Court of Appeals for the Fifth District of Texas, at Dallas
And
The 194 Judicial District Court of Texas

APPENDIX FOR PETITION FOR WRIT OF CERTIORARI

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240 pg

INDEX TO APPENDIX

No.	No.Filed/ Sign Date	Document Title	Page
1.	11-21-2001	Refused-Appellant's Petition For Discretionary Review, Texas Court of Criminal	1
2.	04-05-2001	*Opinion* of Court of Appeals, Fifth District of Texas at Dallas - Affirmed Judgment of Trial Court Court of Appeals, Fifth District of Texas at Dallas, 05-99-01053-CR, *Jay Sheldon Fichtner, Appellant v. The State of Texas, Appellee*	2
3.	04-05-2001	*Judgment* (Trial Court Affirmed) Court of Appeals, Fifth District of Texas at Dallas, 05-99-01053-CR, *Jay Sheldon Fichtner, Appellant v. The State of Texas, Appellee*	27
4.	09-21-2000	*Order* - Trial Court Judgment signed by Hon. Harold Entz is Void; Hon. Robert Dohoney to sign a new judgment	28

5. 03-12-1999 *Judgment and Order Placing the Defendant on Probation* - No. F97-03659-UM, *State of Texas v. Jay Sheldon Fichtner*, 194th Judicial District Court, Dallas County, Texas, signed by Hon. Harold Entz With attached Conditions of Probation 31

6. 09-29-2000 Judgment & Order Placing Defendant on Probation signed by Hon. Robert Dohoney, with no attachments 38

7. 10-12-2000 *Order* Reinstates this appeal. Court of Appeals, Fifth District of Texas at Dallas, 05-99-01053-CR, *Jay Sheldon Fichtner, Appellant v. The State of Texas, Appellee* 40

8. *Original Petition for Review* to Texas Court of Criminal Appeals, Case No. 1129-01 44

9.	02-07-2000	*Appellant's Original Brief,* Court of Appeals, Fifth District of Texas at Dallas, 05-99-01053-CR, *Jay Sheldon Fichtner, Appellant v. The State of Texas, Appellee* *100*
10.	4-23-2001	*Appellant's Original Motion for Rehearing En Bank* *155*
11.	5-22-2001	Appellant's Motion for Rehearing Overruled. 172
12.	10-30-1997	*Defendant's Motion to Set Aside the Indictment,* No. F96-02328-UM, *State of Texas v. Jay Sheldon Fichtner,* 194th Judicial District Court, Dallas County, Texas 173
13.	11-04-1997	*Motion to Dismiss Indictment Because of Double Jeopardy and Lack of Materiality* *178*
14.	11-04-1997	*Motion to Determine Materiality and to Quash or Dismiss Indictment,* No. F96-02328-UM, *State of Texas v. Jay Sheldon Fichtner,* 194th Judicial District Court, Dallas County, Texas 181

15. 12-04-1997 *Objection To Court's Charge to the Jury* (re: "Materiality") No. F96-02329-UM, *State of Texas v. Jay Sheldon Fichtner*, 194th Judicial District Court, Dallas County, Texas 185

16. 12-04-1997 [Handwritten] Objection to specific portion of Court's Charge to the Jury (re: weight of the evidence), No. F96-02329-UM, *State of Texas v. Jay Sheldon Fichtner*, 194th Judicial District Court, Dallas County, Texas 188

17. 12-04-1997 Reporter's Record of Charge Hearing, No. F96-02328-UM, *State of Texas v. Jay Sheldon Fichtner*, 194th Judicial District Court, Dallas County, Texas 189

18. 12-04-1997 Docket Sheet, entitled *Orders of Court* showing Hung Jury - Jury discharged 202

19. 12-05-1997 Reindictment (sic), No. F97-03659-KM, *State of Texas vs. Jay Sheldon*

Fichtner, 194th Judicial District Court of Dallas County, Texas 203

20. 03-04-1999 [Defendant's] *Motion to Dismiss Indictment as Being Unconstitutional*, No. F97-03659-KM, *State of Texas vs. Jay Sheldon Fichtner*, 194th Judicial District Court of Dallas County, Texas 206

21. 03-11-1999 *Plea Bargain Agreement*; No. F97-03659-KM, *State of Texas vs. Jay Sheldon Fichtner*, 194th Judicial District Court of Dallas County, Texas 214

22. 04-12-1999 *Defendant's Motion to Retract Plea Bargain Agreement* 3/11/99, No. F97-03659-KM, *State of Texas vs. Jay Sheldon Fichtner*, 194th Judicial District Court of Dallas County, Texas 217

23. 04-14-1999 *Defendant's Motion for New Trial*, No. F97-03659-UM, *State of Texas v. Jay Sheldon Fichtner*, 194th Judicial District Court, Dallas County, Texas 222

	05-24-1999	[New Trial] DENIED
24.	10-06-2000	*Defendant's Motion for Judgment*, No. F97-03659-UM, *State of Texas v. Jay Sheldon Fichtner*, 194th Judicial District Court, Dallas County, Texas 230
25.	10-06-2000	*Defendant's Motion to Disqualify Hon. Robert Dohoney*, No. F97-03659-UM, *State of Texas v. Jay Sheldon Fichtner*, 194th Judicial District Court, Dallas County, Texas 234
26.	03-11-1999	On docket sheet entitled, *Orders of Court*, finalization of trial and discharge of jury. No. F97-03659-UM, *State of Texas v. Jay Sheldon Fichtner*, 194th Judicial District Court, Dallas County, Texas

Appendix No 1

[Postmark] Nov 21, 2001

OFFICIAL NOTICE OF COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION
AUSTIN, TEXAS 78711

COA#: 05-99-01053-CR
RE: Case No. 1129-01
STYLE: FICHTNER, JAY SHELDON

On this day the Appellant's Pro Se Petition for Discretionary Review has been DENIED.

Troy C. Bennett, Jr., Clerk

JAY S. FICHTNER
14901 QUORUM DR SUITE 740
DALLAS, TX 75240-6793

Appendix No. 2

AFFIRMED; (sic) Opinion issued April 5, 2001

In the
Court of Appeals
Fifth District of Texas at Dallas

No. 05-99-01053-CR

JAY SHELDON FICHTNER, Appellant

V.

THE STATE OF TEXAS, Appellee

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On Appeal from the 194th Judicial District Court
Dallas County, Texas
Trial Court Cause No. F97-03659-KM

OPINION

Before Justices James, Wright and Bridges
Opinion By Justice James

Pursuant to a plea bargain, appellant a family law attorney, was convicted of misdemeanor perjury. Appellant received a suspended sentence and a fine of $300 and was placed on community supervision for one year. Also pursuant to the plea bargain, appellant surrendered his law license. On appeal, appellant brings six issues, with multiple sub-issues. Appellant first argues that notwithstanding his plea bargain his right of appeal is not restricted. He further contends the judgment is void or voidable because a recused judge signed the judgment; there was no order appointing the visiting judge who presided over appellant's retrial; the trial court erroneously ruled the State could use certain extraneous offense evidence in rebuttal; and his plea was involuntary. Appellant also contends the aggravated perjury statute pursuant to which he was indicted is unconstitutional under the federal constitution, his conviction is barred by double jeopardy, there was no probable cause for the aggravated perjury indictment, the evidence is insufficient to support his conviction , and the trial court erred in overruling his motion for new trial. Additionally, in a post-submission filing, appellant has raised an additional issue claiming the trial judge erred in failing to recuse himself after this Court abated the appeal for the judge who presided over appellant's retrial to sign a final judgment. We resolve appellant's issues against him and affirm the judgment of the trial court.

The events giving rise to the charges arise out of a child custody dispute between the children's paternal grandmother (and other paternal relatives) and the children's mother.

Appellant represented the mother. The trial court issued a writ of habeas corpus requiring appellant's client to appear in court with her children. Appellant's client failed to have her children in court on the day provided for in the writ. Thereafter, a hearing was held on the grandmother's request for a writ of attachment requiring that the children be taken into custody. Over appellant's objections, the trial court determined that writ of attachment should issue. Counsel for the grandmother then presented a proposed form of order to the trial court and directed the court's attention to alternative provisions in the proposed order requiring that the children be delivered to the court or to the custody of the grandmother. The trial judge directed the grandmother's counsel to provide a copy of the proposed order to appellant. The judge then announced he was granting the writ and proceeded to make certain handwritten changes to the proposed order, all while appellant was still in the courtroom. Appellant, however, left the courtroom before obtaining a copy of the signed order with the handwritten changes. The signed order reflects that the trial judge chose to have the children taken into custody and delivered to their grandmother and struck the alternative provision.

Appellant later filed in this Court a motion for leave to file a petition for writ of mandamus, claiming the trial court's order was fatally defective because it contained conflicting provisions as to where the children were to be taken. Rather than obtaining a conformed copy of the signed order from the trial court to attach to his motion as an exhibit, appellant

instead used a copy of the proposed order which he "self-conformed" by filling in the date of the hearing and writing in the judge's name on the signature line, preceded by the notation "/s/." Appellant also verified his motion stating: "[T]he exhibits attached to this motion and contained in the *Appendix of Exhibits,* which are attached and incorporated in these proceedings, are true and correct to the best information and belief of affiant; [and] that the allegations of fact contained in these proceedings are true and correct." Appellant's "motion for leave" was denied. Subsequently, appellant was indicted for the felony offenses of aggravated perjury and tampering with physical evidence. Counsel for the grandmother was listed on each indictment as the complaining witness. The indictments generally alleged appellant made a false statement under oath in the motion he filed with this court and knowingly used a falsified document in an official proceeding. *See* Tex. Pen. Code Ann. §§37.02, 37.03, 37.09 (Vernon 1994 & Supp. 2001). Appellant pleaded not guilty.

Appellant originally was tried for both offenses before the same jury. This trial resulted in a hung jury, and appellant was retried. Prior to the retrial, however, the State dismissed the original aggravated perjury and indictment and re-indicted appellant for that offense. The new indictment omitted an allegation that appellant personally appeared before a notary and changed the term "affidavit" to "verification" in describing the document which allegedly

contained the false statement. The tampering with evidence indictment remained unaltered.

Also prior to retrial, the presiding judge of the court who had presided over the first trial determined not to preside in the second. Instead, the second trial was conducted by a senior district, the Honorable Robert Dohoney.

During the second trial, the State received a favorable ruling during its rebuttal case allowing the State to call seven witnesses. One of the witnesses was an eleven-year-old child, who was one of the children involved in the underlying custody dispute. She testified appellant asked her to lie in the custody dispute by changing her story to deny that her stepbrother had sexually molested her. She also claimed appellant offered her twenty dollars if she would testify as he asked. After the trial court's ruling permitting her testimony (together with the other six witnesses), appellant agreed to a plea bargain. In return for the State dropping the tampering with physical evidence charge and reducing the aggravated perjury offense to a misdemeanor, appellant agreed to serve one year probation, pay a $300 fine, and surrender his law license.

The trial court accepted the plea bargain. Appellant surrendered his law license and the court rendered judgment sentencing appellant to one year in jail, suspended and probated for one year, and a $300 fine. Following judgment, appellant filed motions for a new trial and to withdraw his

plea bargain. Appellant claimed, inter alia, he had newly discovered evidence regard the veracity of the child witness who had been proffered by the State. The trial court denied appellant's motions, and this appeal followed.

In connection with his first issue, appellant initially argues that notwithstanding (sic) his plea bargain his right of appeal is not restricted. Specifically, appellant complains he agreed to only one year probation, while the judgment imposed a one year jail sentence, which the trial court suspended. Appellant's argument lacks merit.

If a defendant pleads guilty to a misdemeanor offense pursuant to a plea bargain, and the punishment assessed does not exceed the punishment recommended by the prosecutor and agreed to by the defendant and his attorney, on appeal the defendant may raise non-jurisdictional defects only if he raised them before trial, or if he obtained permission of the trial court to appeal. *Taylor v. State*, 997 S.W.2d 821, 822 (Tex. App.-Houston [1st Dist.] 1999, no pet.).[1] In our view, the

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1. Both appellant and the State spend considerable time addressing rule 25.2(b)(3), regarding special notice provisions for an appeal arising from a plea bargain. *See* Tex. R. App. P. 25.2(b)(3). Rule 25.2(b)(3), however, is applicable only to a plea bargain from a felony. *See* Tex. Code Crim. Proc. Ann. Art 1.15 (Vernon Supp. 2001). Because appellant pleaded guilty to a misdemeanor, rule 25.2(b)(3) is not applicable here. Nonetheless, case law involving guilty pleas in misdemeanor cases operates to restrict the issues on appeal in a similar to Rule25.2(b)(3) but

punishment assessed did not exceed appellant's plea bargain, therefore, the issues in this appeal are properly limited to those matters raised before trial or as to which the trial court granted permission to appeal[2]

First, while appellant is correct that the plea bargain agreement stated merely that appellant agreed to "one year community supervision," without mentioning the term of the sentence to be probated, the issue was clarified during the plea hearing. "One year on the criminal conviction." The trial judge then asked appellant whether that was his understanding to which appellant responded, "Yes, sir." Thereafter, the trial judge pronounced the following sentence in appellant's presence:

> And pursuant to the plea bargain and having found you guilty of the offense of perjury, the Court assesses punishment at a fine of three hundred dollars, jail time in the Dallas County

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without the special notice-of-appeal provisions. *See Lemmons v. State*, 818 S.W.2d 58, 61-63 (Tex.Crim.App 1991); *Isam v. State*, 582 S.W.2d 441, 442-44 (Tex.Crim.App. 1979); *Taylor v. State*, 916 S.W.2d 680, 684-85 (Tex.App. - Waco 1996, pert. ref'd) (all three cases address guilty pleas in misdemeanor offense cases).

2. The record reflects that the trial court granted appellant permission to appeal only those matters that were raised in writing before the plea.

> Jail for a period of one year. The imposition of the jail time is suspended. You're place on probation for a period of one year under the usual and customary terms of adult probation.

The parties then discussed several additional aspects of the plea, including whether probation would be supervised, the minimum term of appellant's suspension from the practice of law, and whether there would be any further prosecution. At no time did appellant voice any objection to the terms of the sentence pronounced by the court. Appellant specifically repeated that he desired to forfeit his right to continue with the jury trial and, when questioned by the judge, appellant's counsel declined to withdraw the plea.

A term of regular probation in the abstract, without reference to any sentence, does not exist in the law and is not a sentence to which appellant could have agreed or the trial court could have accepted. We believe it clear from the record that all present at the plea hearing understood the sentence to be one year, suspended, and probated for one year. This is the only logical interpretation of the plea bargain agreement. When regular probation, or community supervision, is ordered, the defendant's sentence is not imposed, it is suspended. *See In re Beck*, 26 S.W.3d 553, 555 (Tex.App.-Dallas 2000, orig. proceeding), *overruled on other grounds sub nom, Hill v. Court of Appeals for the Fifth District*, 34 S.W.3d 924 (Tex.Crim.App. 2001). Successful service of probation relieves the defendant from serving his sentence. *See Wiltz v. State*, 863

S.W.2d 463, 465 (Tex.Crim.App. 1993). Therefore, a term of regular probation necessarily implies that a sentence must first be pronounced, then suspended, to allow the defendant the opportunity to complete the term of probation in lieu of his sentence.

Furthermore, even if the parties did not agree on the terms of the sentence to be probated, it does not change the result. If a plea bargain fails to address certain matters, the defendant has no right to demand performance of terms not appearing in the agreement or record. *Ex parte Williams*, 758 S.W.2d 785, 786 (Tex.Crim.App. 1988). At worst, the parties simply had no agreement on the term of sentence which was to be probated thereby leaving it to the trial court to set the term. Appellant however, received all he bargained for - one year probation. The judgment did not exceed the terms of the plea bargain. Therefore, this appeal is limited by the usual requirements pertaining to plea bargains in misdemeanor cases.

Also within the ambit of his first issue, appellant asserts several separate sub-issues which he contends serve as a basis for reversal. We detect four distinct sub-issues in appellant's argument: (1) the judgment was signed by a judge who recused himself; (2) the senior district judge who presided over appellant's retrial was not properly appointed; (3) the trial court erred in ruling that the child witness could testify, and (4) appellant's plea was not voluntary. Additionally, after submission appellant raised a related issue

challenging the authority of the senior district judge to sign a final judgment during the abatement of this appeal. We conclude each of these matters arguably falls within an exception to the general rule discussed above restricting issues on appeal, therefore, we will address each sub-issue in turn.

Appellant first complains that the presiding judge of the 191st District Court, the Honorable Harold Entz, signed the judgment in this case even though Judge Entz had recused himself after the appellant's first trial. After submission, we abated this appeal to allow the Honorable Robert Dohoney, who presided over appellant's retrial, to sign a final judgment in this case. Judge Dohoney promptly signed the judgment and the appellate record has been supplemented accordingly. Therefore, appellant's complaint is moot.[3]

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3 Our order of abatement, issued September 21, 2000, states that the record reflects Judge Entz recused himself and therefore the judgment he signed was void. *See Sparkman v. State*, 997 S.W.2d 660, 664 (Tex.App.-Texarkana 1999, no pet) (holding recused judge in criminal case may not take any action in a case after recusal). A more thorough review of the record, however, reveals that our statement concerning the record may have been in error. The record in fact contains no order of recusal. The only reference in the record relating to the presiding judge's decision not to preside over the retrial is an undated handwritten notation, which appears to be written on two "post-it" notes stuck to the docket sheet. The notation states: "I am 'out' of this case. Bob Dohoney is the 'assigned'

Appellant further contends that Judge Doh ney was not properly appointed to appellant's case because there was no order of appointment by the presiding judge of the first administrative region appointing Judge Dohoney following the purported recusal of Judge Entz. Appellant's complaint lacks merit and is untimely. We take judicial notice that Judge Dohoney is a duly designated senior judge, having retired as a district judge and having timely elected to be a judicial officer. *See Herrod v. State*, 650 S.W.2d 814, 817 (Tex.Crim.App. 1983)(taking judicial notice that retired judge timely elected to continue as a judicial officer), *Buchanan v. State*, 471 S.W.2d 401,404 (Tex.Crim.App. 1971) (same). A retired judge sitting by administrative assignment possesses all powers of the court to which the judge is assigned. *Alexander v. State*, 903 S.W.2d 881, 883 (Tex.App.-Fort Worth 1995, pet. ref'd). If a judge is properly assigned to one district court, the judge is authorized to preside in other district courts of the same county. *Ex party Dharmagunaraine*, 950 S.W.2d 140, 141 (Tex.App.-Fort Worth 1997, pet. ref'd) (op. On reh'g) (en banc). No formal order of appointment is necessary for the judge of one district court to

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judge. Ask Debbie to present this to Judge Dohoney ---
-HE" There is no explanation as to why Judge Entz considered himself to be " 'out' of the case." Nonetheless, because the State has not contested appellant's assertion that Judge Entz recused himself, and because whether he did makes no difference to our ultimate disposition, we do not disturb our September 21order.

preside over a case in the place of the elected judge. *Buchanan*, 471 S.W.2d at 404. A retired judge who has properly filed an election to continue to serve as a judicial officer is a district judge in this sense, and no formal order of appointment is necessary for the retired to judge (sic) to preside over a case in the stead of an elected judge. *Id.* Furthermore, procedural irregularities in the referral of a matter to a visiting judge does not render a judgment void. *See Davis v. State*, 956 S.W.2d 555, 560 (Tex.Crim.App. !997).

Appellant complains that the record fails to reflect any order appointing judge Dohoney to the 194th District Court. Appellant, however, has failed to show that Judge Dohoney was not generally assigned to another district court in Dallas County. As a senior judge generally assigned to another district court in Dallas County, Judge Dohoney could sit for another district judge and preside over appellant's trial in the 194th District Court without the necessity of a formal order. Absent any evidence to the contrary, we presume Judge Dohoney was properly assigned to a district court in Dallas County. Furthermore, appellant failed to object to Judge Dohoney's authority at trial, and he may not assert the objection for the first time on appeal. *See Wilson v. State*, 977 S.W.2d 379, 380-81 (Tex.Crim.App. 1998) (holding defendant cannot object for the first time on appeal to a procedural irregularity in the assignment of a former judge who is otherwise qualified. Accordingly, we resolve this issue against appellant.

In a supplemental issue raised after submission, appellant complains that after we issued our order abating this appeal to allow Judg Dohoney to sign a final judgment, appellant filed a motion to recuse Judge Dohoney.[4] Judge Dohoney, however, proceeded to sign the final judgment without referring appellant's motion to the presiding judge as required by rule 18a of the Texas Rules of Civil Procedure. Appellant asserts Judge Dohoney erred in failing to refer appellant's recusal motion to the presiding judge.

We have not granted leave for appellant to file a supplemental issue. *See* Tex. R. App. P. 38.7. Nonetheless, we address the issue in the interest of justice, and we conclude the issue lacks merit. The court of criminal appeals has adopted rule 18a of the Texas Rules of Civil procedure for criminal cases. *Arnold v. State*, 853 S.W.2d 543, 544 (Tex. Crim. App. 1993). Rule 18a requires that upon the filing of a recusal motion, the judge recuse himself or refer the motion to the presiding judge of the administrative region and take no

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4. Although appellant's motion was entitled as a "motion to disqualify," it is properly termed as a motion to recuse. Disqualification is limited to three grounds: (1) the judge is the injured party; (2) the judge has been counsel for the accused or the State, or (3) the judge is related to the defendant or complainant by affinity or consanguinity within the third degree. *See* Tex. Code Crim. Proc. Ann. art. 30.01 (Vernon Supp. 2001). Appellant asserted none of these grounds in his motion. Rather, appellant restated his contention that Judge Dohoney was never properly assigned to the case. Therefore, appellant presented no grounds for disqualification, and we consider the motion to be one for recusal.

further action except for good cause specifically stated in the order in which such action is taken. Tex. R. Civ. P. 18a(c). Rule 18a further provides, however, that a motion to recuse must be raised at least ten days prior to trial or must be verified. Tex. R. Civ. P. 18a(a). Appellant failed to comply with either requirement, and he has proffered no explanation for the failure to do so. If a recusal motion does not comply with rule 18a, the trial judge is under no obligation to either recuse himself or refer the motion for assignment to another judge. *DeBlanc v. State*, 799 S.W.2d 701, 705 (Tex. Crim App. 1990)("Failure to comply with the ten day notice provision of Rule 18a bars complaint on appeal of the denial of a separate hearing before another judge on the motion to recuse"); *Bruno v. State*, 916 S.W2d 4, 7 (Tex. App. - Houston [1st dist.] 1995, no pet.)(holding failure to verify motion to recuse precluded appellate review; *cf. Metzger v. Sebek*, 892 S.W.2d 20, 49 (Tex. App. - Houston [1st dist.] 1994, writ denied)(holding in civil action that compliance with ten day provision not required when compliance is impossible through no fault of party asserting motion to recuse). There is no reason appellant could not have complained of Judge Dohoney's assignment prior to trial and appellant's failure to verify the motion further renders it defective. Therefore, Judge Dohoney was not required to consider appellant's motion. *DeBlanc*, 799 S.W.2d at 705; *Bruno*, 916 S.W.2d at 7; *see also madden v. State*, 911 S.W.2d 236, 239 (Tex. App. - Waco 1995, pet. ref'd)(holding defendant waived recusal motion when complaint was asserted for first time on appeal).

We next turn to appellant's voluntariness complaint.[5] Appellant contends his plea was involuntary because it was made under threat that the State would use its eleven-year rebuttal witness. Appellant contends the child was prepared to lie and, additionally, the child's testimonywould tend in some manner to associate appellant with sexual abuse, thereby depriving appellant of a fair trial.

The voluntariness of a guilty plea is determined by the totality of the circumstances. *Munoz v. State*, 840 S.W.2d 69, 74 (Tex. App. - Corpus Christi 1992, pet. ref'd). Proper admonishment by the trial court creates a prima facie showing that a guilty plea was knowing and voluntary. *Tovar-Torres v. State*, 860 S.W.2d 176, 178 (Tex. App. - Dallas 1993, no pet.). The burden then shifts to the defendant to prove that he did

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5. Traditionally, voluntariness issues may be asserted for the first time on appeal notwithstanding a guilty plea pursuant to a plea bargain. *See Flowers v. State*,, 935 S.W.2d 131, 133-34 (Tex. Crim. App. 1996); *Moore v. State*, 4 S.W.3d 269, 272 (Tex. App. - Hous. [14th Dist.] 1999, no pet.)("voluntariness of a plea can always be challenged on appeal as a fundamental right"). The court of criminal appeals, however, has recently determined that under appellate rule 25.2(b)(3) voluntariness may not be raised in a direct appeal following a plea-bargained felony conviction, unless the defendant obtains the permission of the trial court. *See Cooper v. State*, No. 1100-99, 2001 WL 321579 (Tex. Crim. App. April 4, 2001). As we have discussed, however, rule 25.2(b)(3) does not apply to appellant's misdemeanor conviction. We, therefore, assume, without deciding that notwithstanding a plea bargain, a defendant may raise voluntariness for the first time on appeal in a misdemeanor case.

not understand the consequences of his plea. *Id.* Further, when a defendant indicates at the plea hearing that he understands the nature of the proceeding and is pleading guilty because the allegations in the indictment are true, not because of any outside pressure or influence, he has a heavy burden to prove on appeal that his plea was not made knowingly and voluntarily. *Curry v. State*, 861 S.W.2d 479, 483 (Tex. App. - Fort Worth 1993, pet ref'd); *Jones v. State*, 855 S.W.2d 82, 84 (Tex. App. - Houston [14th Dist.] 1993, pet. ref'd).

While appellant may well have felt pressure to agree to a plea bargain rather than risk the jury hearing from the State's rebuttal witnesses, mere pressure to plead guilty does not render a plea involuntary. "All pleas of guilty are the result of some pressures or influences on the mind of the defendant . . . The crucial issue is whether, under all the facts and circumstances, the plea was truly voluntary. The plea must be a genuine one by a defendant who understands the situation, his rights, and the consequences of his plea and is neither deceived nor coerced." *Gaither v. State*, 479 S.W.2d 50, 51 (Tex. Crim App. 1972)(quoting *Schnautz v. Beto*, 416 F.2d 214, 215-16 (5th Cir. 1969)).

The record reflects that appellant was duly admonished concerning the consequences of his plea and that he knowingly and intelligently entered his plea. Appellant specifically stated he was pleading guilty simply because he was guilty and no one threatened, forced, or coerced him into entering the plea of guilty. In fact, appellant does not claim

that he was unaware of or in anyway misled as to the consequences of his plea. Every indication in the record is that appellant was fully aware of his rights and the consequences that would follow his plea, including disbarment for a minimum of five years. As an experienced attorney, appellant was better equipped then most criminal defendants to appreciate the consequences of his plea. Appellant's voluntariness argument amounts to nothing more than an assertion appellant made a difficult decision which he later came to regret. "A difficult decision is not an involuntary decision." *Torres v. State*, 925 S.W.2d 361, 363 (Tex. App. - Fort Worth 1996, no pet.). Appellant has failed to meet his heavy burden of establishing that his plea was involuntary.

Appellant next contends the trial court erred in ruling that the eleven-year -old witness could testify. Appellant complains he was unfairly surprised by the State's failure to designate the witness and that her testimony improperly raised extraneous offenses which were remote, immaterial, and irrelevant, and any probative value of her testimony was overwhelmingly outweighed by its adverse effect upon the jury. Appellant apparently contends he would not have accepted the plea bargain And pled guilty but for the trial court's erroneous ruling to admit this testimony. This argument also lacks merit.

Because the testimony was offered in rebuttal, the State was not required to designate the witness pursuant to rule 404(b). *See* Tex. R. Evid. 404(b)(providing that upon timely

request, State must provide reasonable notice of State's intent to introduce other crimes, wrongs, or acts in *States case-in-chief*). As a general rule, the State is entitled to present on rebuttal any evidence that tends to refute a defensive theory as well as the evidence introduced to support that theory. *Marles v. State*, 919 S.W.2d 669, 672 (Tex. App.-San Antonio 1996, pet. ref'd). The possibility that such rebuttal evidence may encompass extraneous offenses or acts on the part of the defendant does not preclude its admission into evidence. *Yohey v. State* , 801 S.W.2d 232,236 (Tex App.-San Antonio 1999, pet. ref'd). Because appellant's testimony raised the issue of the defensive theory of mistake, the State was entitled to rebut that theory even if the rebuttal evidence consisted of extraneous offenses. *See, e.g. Davis v. State*, 979 S.W.2d 863, 867 (Tex. App.-Beaumont 1998, no pet.).

Additionally, the testimony was also relevant for purpose other than character conformity. *See* Tex. R. Evid. 404(b)(providing that evidence of other crimes, wrong , or acts are not admissible to prove the character of a person in order to show action in conformity therewith, but may be admissible for other purposes). Appellant testified that he had no criminal intent but merely made innocent mistakes. Evidence that appellant suborned perjury in another case, however, was relevant to show absence of mistake in the present case.

Furthermore, we cannot say, after considering all relevant factors, that the trial court clearly abused its

discretion in determining that the testimony was not unfairly prejudicial under rule 403. *See* Tex. R. Evid. 403, *see also Reese v. State*, 33 S.W.3d 238, 240-41 (Tex. Crim App. 2000); *Montgomery v. State*, 810 S.W.2d 372, 391-93 (Tex. Crim App. 1990)(op. on reh'g). A trial court's ruling on a rule 403 objection is reviewed under the abuse of discretion standard and will be reversed only if it is not within the zone of reasonable disagreement. *See McFarland v. State*, 845 S.W.2d 824, 837-38 (Tex. Crim. App. 1992). Rule 40s "favors admissibility of relevant evidence, and the presumption is that relevant evidence will be more probative than prejudicial." *Long v. State*, 823 S.W.2d 259, 271 (Tex. Crim. App. 1991). "Almost every piece of evidence presented at trial can be said to be prejudicial to one side or the other. Only evidence that is *unfairly* prejudicial must be excluded under Rule 40s." *Mill v. State*, 2 S.W.3d 475, 482 (Tex. App.-Tyler 1999, no pet.).

While appellant does not elaborate as to why he contends the child's testimony was unfairly prejudicial, appellant seems to argue that because the child would have testified appellant attempted to persuade her to say she was not sexually molested by her half-brother, appellant would be tainted with "emotionally charged" allegations of "unsubstantiated sexual abuse." Appellant's argument is speculative. Neither the child's testimony, nor any other evidence, in any way implicated appellant in sexual abuse. We cannot conclude that the trial court acted outside the zone of reasonable disagreement in determining the jury could have considered the testimony for its intended purpose other than

imputing extraneous content to the testimony that has no basis in fact.

Finally, even if the trial court did err in its preliminary ruling to admit the testimony, we cannot conclude the error was harmful. Appellant's guilty plea deprives us of the opportunity to review the evidence in the full context of the trial. The evidence was never admitted before the jury, and it was not dispositive of guilt. The jury may or may not have convicted appellant. We have no way of knowing the weight it might have accorded the testimony and what, if any, limiting instructions the court may have given. Further, we have no way of knowing, as the testimony from all seven rebuttal witnesses may have been developed before the jury, whether the trial judge might have changed his mind as to whether the extraneous offense evidence was admissible. Under these circumstances, we cannot conclude the ruling affected a substantial right of appellant's requiring reversal. *See* Tex. R. App. P. 44.2(b).

While appellant's first issue also digresses through a variety of other matters which occurred during the course of this litigation, we fail to detect any further issues relevant to this appeal. To the extent appellant has attempted to raise yet further issues under the heading of his "first" issue, we hold that any such issues have been waived for improper briefing. *See McDuff v. State*, 939 S.W.2d 607, 613 (Tex. Crim App. 1997); *Stahle v. State*, 970 S.W.2d 682, 692 (Tex. App-Dallas 1998, pet

ref'd.). Accordingly we resolve each h of the matters raised in appellant's first issue against him.

In his second issue, appellant contends the aggravated perjury statute pursuant to which appellant was indicted is unconstitutional. Appellant specifically contends that the provision of the statute which requires materiality to be determined by the court runs afoul of United States Supreme Court authority holding that all elements of a criminal offense must be determined by a jury. *See United States v. Gaudin*, 515 U.S. 506, 522-23 (1995). Appellant contends he preserved this issue for review by raising it in a motion to dismiss filed in the re-indicted case following the first trial.[6] However, other courts which have considered this issue have determined that it is premature to assert this issue in a motion to dismiss this indictment. *See Ex. Parte Tamez*, 4 S.W.3d 366, 367-68 (Tex. App.-Houston [1st Dist.] 1999, no pet.) We need not decide, however, whether the issue was properly preserved and, if so, whether the statute is unconstitutional. In the case at bar, the State filed a motion to reduce the aggravated perjury charge to misdemeanor perjury, and it is the misdemeanor charge to which appellant plead guilty and was convicted. The misdemeanor perjury statute does not suffer from the same constitutional infirmity alleged to exist in the felony statute. *Compare* Tex. Pen., Code Ann. §37.02 (Vernon 1994) *with* Tex.

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6. For the same reason, the State concedes we have jurisdiction to address this issue

Pen. Code Ann. §37.03(a)(2) Vernon 1994). Accordingly, because appellant pleaded guilty to a different offense than he challenges on appeal, any error in the trial court's failure to dismiss the aggravated perjury indictment was harmless.[7] *See* Tex. R. App. P. 44.2. We resolve appellant's second issue against him.

In his third issue, appellant contends this prosecution is barred by the principle of double jeopardy. Appellant contends that the constitutional infirmity he complains of in his second issue related in an erroneous instruction to the jury in the first trial, and the erroneous instructin was the cause of the mistrial. Therefore, appellant contends jeopardy attached when the first trial resulted in a mistrial.

The State contends appellant waived his issue by failing to assert it before trial in the reindicted case and by pleading guilty. *See Gonzalez v. State* 8 S.W.3d 640, 642-44 (Tex. Crim. App. 2000) (noting "[o]ur case-law on preservation of double jeopardy claims is not a model of clarity," but stating in dicta that a successive prosecution claim can in certain instances be waived by failing to assert it at trial); *but see Ex parte Birdwell*, 7 S.W.3d 160,163 (S\Tex. Crim. App. 1999) (noting that pleading guilty by itself does not bar a double jeopardy attack). Assuming for purpose of discussion

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7. We note additionally that appellant has not asserted that the alleged constitutional infirmity in any way rendered his plea involuntary.

that appellant's double jeopardy claim has been preserved for review, we nevertheless conclude it is without merit. First, appellant cites not authority for his position other than cases setting forth the general principle that jeopardy attaches when the jury is sworn. This general principle, however, does not bar retrial following a hung jury. *Durbin v. State*, 716 S.W.2d 131,133 (Tex. App-El Paso 1986, pet ref'd); *see also Serna v. State*, 882 S.W.2d 885, 887 (Tex. App.-Corpus Christi 1994, no pet.) ("Balanced against [double jeopardy] . . . right of society to be protected from those guilty of crimes by enabling society to retry the accused under certain circumstances."). Additionally, appellant's contention that the allegedly unconstitutional provision in the aggravated perjury statute led to a hung jury in the first case is merely speculative and has no basis in the record. Further, appellant fails to explain why an erroneous jury instruction based on an unconstitutional provision in a statute would necessarily cause jeopardy to attach in this case and bar retrial. *Cf. United States v. Gaudin*, 28 F.3d 943, 952 (9th Cir. 1994) (remanding case for further proceedings following reversal for failure to submit materiality element to jury). *aff'd*, 515 U. S. 506 (1995). Therefore, we conclude appellant has failed to demonstrate retrial was barred by the principle of double jeopardy, and we resolve appellant's third issue against him.

In his fourth issue, appellant claims there was no probable cause for the aggravated perjury indictment. This issue has not been preserved for review. Appellant's only attack on the indictment in the reindicted perjury case was

that the aggravated perjury statute is unconstitutional. Prior to trial, appellant did not contest lack of probable cause in the reindicted case, and he did not move to incorporate motions and orders from the dismissed case to the reindicted case. *Cf. Hanie v. State*, 820 S.W.2d 7, 9 (Tex. App.-Dallas 1991, writ dism'd w.o.j.) (Holding jury waiver not asserted or adopted in reindicted case was ineffective). Moreover, appellant has failed to identify, nor do we find, any place in the record where appellant timely filed, presented, or obtained a ruling on any such motion prior to his plea. Appellant was required to present the matter in writing to the trial court and request a ruling prior to trial to preserve the issue for review. *See Taylor*, 997 S.W.2d at 822; *see also* Tex. R. App. P. 33.1; *Guevara v. State*, 985 S.W.2d 590, 592 (Tex. App.-Hous. [14th Dist.] 1999, pet. ref'd). Appellant failed to do so. Accordingly, we resolve appellant's fourth issue against him.[8]

In his fifth issue, appellant contends the evidence is insufficient to support the judgment. We conclude appellant is barred from asserting this issue because of his guilty plea. A sufficiency challenge is not a jurisdictional issue or a matter that can be raised before trial, nor did appellant obtain permission to appeal this matter. *See Delatore v. State*, 957 S.W.2d 1435, 150 n.3 (Tex. App.-Austin 1997, pet. ref'd)

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8. To the extent appellant asserts the same probable cause argument in his second issue, we resolve it against him for the same reasons.

(holding sufficiency challenge could not be raised following plea bargain); *Rem v. State*, 846 S.W.2d 870, 874 (Tex.App.-Houston [1st Dist.] 1992), *aff'd*, 873 S.W.2d 383 (Tex. Crim App. 1994). Nonetheless, we observe parenthetically that a guilty plea alone will support a judgment in a misdemeanor case. *See Isam v. State*, 582 S.W.2d 441, 443 (Tex. Crim. App. 1979). Accordingly, we therefore resolve appellant's fifth issue against him.

In his final issue, appellant contends the trial court erred in failing to grant appellant's motion for new trial. It is well established that the grant or denial of a motion for new trial lies within the sound discretion of the trial court. *Lewis v. State*, 911 S.W.2d 1, 7 (Tex. Crim. App. 1995). We do not substitute our judgment for that of the trial court, rather, we decide whether the trial court's decision was arbitrary or unreasonable. *Id.* We will reverse only when the trial court's decision was clearly wrong and outside the zone of reasonable disagreement. *State v. Gonzalez*, 855 S.W.2d 692, 695 n.4 (Tex. Crim App. 1993). The ruling of the trial court is presumed to be correct, and the burden rests on the appellant to establish the contrary. *State v. Kelly*, 20 S.W.3d 147, 150-51 (Tex. App.-Texarkana 2000, no pet); *State v. Gill*, 967 S.W.2d 540, 541 (Tex. App.-Austin 1998, pet ref'd); *see also Lee v. State*, 167 Tex. Crim 608, 611, 322 S.W.2d 269, 262 (1958) In his brief on this issue, appellant incorporates by reference the previous arguments in his briefing, refers us to his motion for new trial, and argues generally that the trial court should have granted a new trial in the interest of justice. This is sufficient to show the trial

court abused its discretion in denying appellant's motion. Appellant has failed to cite any fact-specific authority or meaningful analysis to demonstrate reversible error. *See Stahle*, 970 S.W.2d at 692 (determining appellant failed to preserve issue for review when brief provided no discussion or analysis of relevant authorities or the record to support his argument). Under these circumstances, we cannot conclude this point has been adequately preserved for our review.

Nonetheless, in the interest of justice we have reviewed appellant's motion for new trial, and we conclude the issues raised therein were either waived by appellant as a result of his guilty plea or are not supported by the record. In particular, we note that on the basis of the record the trial court could have reasonably concluded appellant's claim of newly discovered evidence was baseless. All of the evidence appellant claimed was new consisted of impeachment and character evidence to attach the credibility of the child witness proffered by the State. The record demonstrates appellant had access to or was aware of all this evidence well before trial. Appellant's actual complaint appears to be not that the evidence was newly discovered, but that he was unprepared to present it because he was surprised by the State's rebuttal witnesses. The fact appellant was unprepared to present his evidence does not make it new. Appellant did not request a postponement of the proceedings to marshal his evidence, and he asserts no claim of error that he was denied the opportunity. Rather, appellant undertook to bargain with

the State as to his punishment and to plead guilty. This was appellant's choice, a choice which we have already determined appellant made knowingly and voluntarily. We cannot conclude the trial court abused its discretion in denying appellant's motion for new trial. We therefore resolve appellant's sixth issue against.

We affirm the judgment of the trial court.

/s/Tom James
TOM JAMES
JUSTICE

Do Not Publish
Tex.R.App.P. 47
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Appendix No. 3

In The
Court of Appeals
Fifth District of Texas

JUDGMENT

JAY SHELDON FICHTNER, Appellant

No. 05-99-01053-CR V.

THE STATE OF TEXAS

Appeal from the 194th Judicial District Court of Dallas County, Texas (Tr. Ct. No. 97-03659-KM)

Opinion delivered by Justice James, Justices Wright and Bridges participating.

Based on the Court's opinion of this date, the judgment of the trial court is AFFIRMED.

Judgment entered April 5, 2001.

/s/_____
Tom James, Justice

Appendix No. 4

Order issued September 21, 2000

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-99-01053-CR

JAY SHELDON FICHTNER, Appellant

V.

THE STATE OF TEXAS, Appellee

==========

On Appeal from the 194th Judicial District Court
Dallas County, Texas
Trial Court Cause No. F97-03659-KM

==========

ORDER

Before Justices James, Wright, and Bridges

The record in this case reflects that Honorable Harold Entz, presiding judge of the 194th Judicial District Court

recused himself in this case. The Honorable Robert Dohoney thereafter presided over the proceedings as a visiting judge. The March 12, 1999 judgment, however, bears Judge Entz's signature. A judge may not take any action in a case after he recuses himself. *See Sparkman v. State*, 997 S.W.2d 660-, 664 (Tex.App.-Texarkana 1999, no pet). Therefore, we conclude the judgment signed by Judge Entz is void and no final judgment presently exists in this case.

Accordingly, we **ORDER** the Honorable Robert Dohoney to sign a judgment in conformity with the plea bargain approved by Judge Dohoney and the judgment pronounced by him in open court on March 11, 1999.

We further **ORDER** the district clerk's office to transmit a supplemental clerk's record containing the judgment signed by Judge Dohoney to this Court by **OCTOBER 9, 2000.**

We **DIRECT** Clerk to send copies of this order to the following:

Honorable John Ovard
Presiding Judge
First Administrative District
Frank Crowley Courts Building
133 N. Industrial Blvd, LB 50
Dallas, Texas 75207

Honorable Robert Dohoney
Route 2, Box 759M
Whitney, Texas 76692

Herb White
District Clerk's Office
Transcript Department
Frank Crowley Courts Building
133 N. Industrial Blvd.
Dallas, Texas 75207

The Court **ABATES** this appeal to allow the Honorable Robert Dohoney to comply with this order. The appeal will be reinstated on October 9, 2000 or when the supplemental record containing the judgment is received, whichever is earlier.

/S/Carolyn Wright
CAROLYN WRIGHT
PRESIDING JUSTICE

Appendix No. 5

No. F97-03659-KM PDA VOL 404
PAGE 23

THE STATE OF TEXAS JANUARY TERM, 1999
VS.
JAY SHELDON FICHTNER MARCH 12, 1999

JUDGMENT AND ORDER PLACING THE DEFENDANT ON PROBATION

The defendant having been indicted in the above cause for the felony offense of AGGRAVATED PERJURY, A 3RD DECREE FELONY OFFENSE AS CHARGED IN THE INDICTMENT and this cause being called for trial, came the Criminal District Attorney for the State of Texas, and the defendant in person and with his counsel appeared in open Court this day, and the State having filed written motion to reduce the offense charged to the lesser and included misdemeanor offense of: PERJURY, A CLASS A MISDEMEANOR AS INCLUDED IN THE INDICTMENT and the Court having granted such motion, and the defendant having been duly arraigned waived trial by jury and having submitted all issues herein to the Court, and the defendant plead guilty to said lesser and included misdemeanor offense, and the Court having received said plea, and having heard the evidence adjudged the defendant guilty of said less and included misdemeanor offense and assessed his punishment

at a fine of $300.00 and 1(ONE) YEAR confinement in the Dallas County jail, together with all costs in this behalf incurred.

It appearing to the Court that the best interests of society and of the defendant in this cause will best be served by granting the defendant probation herein, and withholding execution of sentence herein, it is

ORDERED that imposition of sentence of the Judgment of conviction of the Court herein shall be suspended for a period of 1(ONE) YEAR, upon the following terms and conditions of probation, to-wit: That during the term of probation the defendant shall:

SEE ATTACHED CONDITIONS

/s/ Harold Entz
Judge

Appendix No. 5 (cont'd)

CONDITIONS OF COMMUNITY SUPERVISION
(REGULAR CONDITIONS)

THE STATE OF TEXAS — IN THE 194TH JUDICIAL DISTRICT COURT

VS. — DALLAS COUNTY, TEXAS

FICHTNER, JAY SHELTON (sic) — JANUARY TERM, 1999

CAUSE NO. F97-03659-M
Perjury
C264213

MISDEM. PROBATION XXXX
DEFERRED PROBATION _____
SHOCK/BOOTCAMP _____
STATE JAIL _____

On this date, March 11, 1999 you are hereby placed on Community Supervision for a period of 1 years (sic). It is the order of this Court that you comply with the following conditions of Community Supervision:

(A) Commit no offense against the laws of this or any other state of the United States and do not possess a firearm during the term of Community Supervision;

(B) Do no use or ingest controlled substances without a valid prescription for said substance from a licensed physician.

(C) do not associate with individuals who commit offenses against the laws of this or any other state or the United States;

(D) Report to the Supervision Officer: WEEKLY, TWICE MONTHLY or MONTHLY, as directed by the Supervision Officer;

(E) Permt the Supervision Officer to visit you at your home or elsewhere and give notice to the Supervision Officer no less than 24 hours PRIOR to any change of residence or employment;

(F) Obtain and maintain employment approved by this Court;

(G) Do not leave Dallas County, Texas without first obtaining permission from your Supervision Officer;

(H) Make payments of $55.00 per month to the Community Supervision and Corrections Department

to be credited toward the following: RESTITUTION $ -0-, FINE $300.00, COURT COST $142.00, COURT APPOINTED ATTY FEE $-0-, URINALYSIS FEE $-0-, CRIMESTOPPER FEE $50.00;

(I) Support your dependents;

(J) Pay a supervision fee of $40.00 per month to the Community Supervision and Corrections Department on or before the first day of each month hereafter during the term of Community Supervision.

(Continued on Page 2 attached)

Appendix No. 5 (cont'd)

Conditions of Community Supervision
(Regular Conditions)
Page 2

Name: Fichtner, Jay Sheldon Cause No.: F97-02329M

(K) [Ed. note: Paragraph "K" is deleted].

(L) Submit to urinalysis as directed by your Supervision Officer;

(M) Effective March 11, 1999; (sic) all licensing to practice law in this or any other state of the United States shall be resigned by the defendant for a period of 5 years from this date.

The Conditions of Community Supervision may be modified by this Court at any time during the period of supervision. The Judge may impose any reasonable condition that is designed to protect or restore the community, protect or restore the victim, punish or reform you. The Court also has the authority at any time during the term of probation, to revoke or proceed to adjudicate your probation for violation of any condition of your probation as set out above.

Witness our signatures this 11th day of March, 1999.

/s/Jay S. Fichtner
DEFENDANT

/s/Harold Entz
JUDGE

/s/?. ?. Rios
Community Supervision Officer

Appendix No. 6

No. F97-03659-KM
PDA Vol. 404, Page 23

THE STATE OF TEXAS January Term, 1999
vs.
JAY SHELDON FICHTNER March 12, 1999

JUDGMENT AND ORDER PLACING THE DEFENDANT ON PROBATION

The defendant having been indicted in the above cause for the felony offense of AGGRAVATED PERJURY, A 3RD DECREE FELONY OFFENSE AS CHARGED IN THE INDICTMENT/REIND, and this cause being called for trial, came the Criminal District Attorney for the State of Texas, and the defendant in person and with his counsel appeared in open Court this day, and the State having filed written Motion to reduce the offense charged to the less and included misdemeanor offense of: PERJURY, A CLASS A MISDEMEANOR AS INCLUDED IN THE INDICTMENT, and the Court having granted such motion, and the defendant having been duly arraigned waived trial by jury and having submitted all issues herein to the Court, and the defendant plead guilty to said less and included misdemeanor offense, and the Court having received said plea, and having heard the evidence, adjudged the defendant guilty of saidless and included misdemeanor offense and assessed his punishment

at a fine of $300.00 and 1(one) YEAR confinement in the Dallas County jail, together with all costs in this behalf incurred,

It appearing to the Court that the best interests of society and of the defendant in this cause will best be served by granting the defendant probation herein, and withholding execution of sentence herein, it is

ORDERED that imposition of sentence of the Judgment of conviction of the Court herein shall be suspended for a period of 1(one) YEAR, upon the following terms and conditions of probation, to-wit: that during the term of probation the defendant shall:

SEE ATTACHED CONDITIONS

[Hand-written] SIGNED September 29, 2000 as ORDERED by ORDER issued September 21, 2000 in Cause No. 05-99-01053-CR in the Court of Appeals, Fifth District of Texas at Dallas.

/s/Robert D. Dohoney
Judge

[Ed. Note: No conditions are attached].

Appendix No. 7

Order issued October 12, 2000

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-99-01053-CR

JAY SHELDON FICHTNER, Appellant

V.

THE STATE OF TEXAS, Appellee

==========

ORDER

==========

The Court **REINSTATES** this appeal.

On September 21, 2000, this Court concluded the judgment signed by the Honorable Harold Entz was void because Judge Entz had previously recused himself in the case. We ordered the Honorable Robert Dohoney to sign a judgment in conformity with the plea bargain approved by Judge Dohoney and the judgment pronounced by him in open court. On October 11, 2000, we received a supplemental

clerk's record containing the judgment signed by Judge Dohoney. Accordingly, we now have before us the judgment from which the appeal is taken.

/s/Carolyn Wright
Carolyn Wright
Presiding Justice

Appendix No. 8

NO. _____

IN THE TEXAS COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

JAY SHELDON FICHTNER
V.
THE STATE OF TEXAS

PETITION TO REVIEW
UNPUBLISHED OPINION OF THE
5TH DISTRICT COURT OF APPEALS
NO. 05-99-01053
AND
THE JUDGMENT OF THE
194TH JUDICIAL DISTRICT COURT OF
DALLAS COUNTY, TEXAS IN TRIAL
TRIAL CAUSE NOS. F 97-03659-KM
AND
F 96-02329-UM

APPELLANT'S ORIGINAL BRIEF
ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF CONTENTS 1

IDENTITY OF PARTIES 12

Statement of the Case 14

Issues and Points Presented for Review 16

1st Issue or Point Presented for Review 16
2nd Issue or Point Presented for Review 16
3rd Issue or Point Presented for Review 17
4th Issue or Point Presented for Review 17
5th Issue or Point Presented for Review 17
6th Issue or Point Presented for Review 18

1st Issue or Point Presented for Review 18
Statement and Argument in Support of 1st Point 19
Conclusion of 1st Issue 36

2nd Issue or Point Presented for Review 37

3rd Issue or Point Presented for Review 37

4th Issue or Point Presented for Review 38
Statement and Argument of 2nd, 3rd and 4th Points 38
Conclusion of 2nd, 3rd and 4th Points 54

5th Issue or Point Present for Review 55
Statement and Argument of 5th Point 56
Conclusion of 5th Point 62

6th Issue or Point Presented for Review 62
Statement and Argument of 6th Point 63
Conclusion of 6th Point 65

CONCLUSION 66

PRAYER 67

Certificate of Service 68

TABLE OF AUTHORITIES

TEXAS CASES

Alvarez v. State, 511 S.W.2d 493 (Tex.Crim.App. 1974) 16

Banowsky v. State Farm Ins. Co., 876 S.W.2d 509 (Tex.App. Amarillo 1994, no writ) 32, 36

Bledsoe v. Mack, 57 S.W.2d 869 (Tex.Civ.App. Galveston 1933, no writ) 37, 38

Bonilla v. State, 933 S.W.2d 538, 543 (Tex.App. Houston [1st dist.] 1996, no pet.) 45, 49

Brasher v. State, 715 S.W.2d 827, 831 (Tex.App. Houston [14th dist.] 1986, no petition) 37

Brownlee v. Brownlee, 665 S.W.2d 111 (Tex. 1984) 37

Buckholts ISD, et al. V. Glaser, 632 S.W.2d 146, 148 (Tex. 1982) 37

Burke v. Satterfield, 525 S.W.2d 950, 955 (Tex. 1975) 36

Cameron v. State, 530 S.W.2d 841 (Tex.Crim.App. 1975) 19

Carter v. State, 565 S.W.2d 468 (Tex.Crim.App. 1983) 49

Champion Int'l Corp. v. Twelfth Court of Appeals, 762 S.W.2d 898, 899 (1988) 56, 57

Clewis v. State, 922 S.W.2d 126 (Tex.Crim.App. 1996) 49

Davis v. California Shoes, Inc., 612 S.W.2d 703, 704 (Tex.Civ.App. Dallas 1981, no writ) 36, 37, 44

Ervin v. State, 1999 WL 10277 (Tex.Crim.App. 1999) 25

Eubanks v. State, 1999 WL 976163 (Tex.App. Texarkana 1999, no pet.) 27

Fry v. Tucker, 202 S.W.2d 218, 221 (Tex. 1947) 27

Graham v. McCarty, 69 Tex. 323, 7 S.W. 342 36

Haft v. State, 416 S.W.2d 824 (Tex.Crim.App. 1967) 19

Helms v. State, 484 S.W.2d 924, 927 (Tex. Cr. App. 1972) 25, 27

Hines v. State, 571 S.W.2d 322 (Tex.Crim.App. 1978) 19

Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 918 (Tex. 1985) 56

Mitchell v. State, 608 S.W.2d 228 (Tex.Crim.App. 1980) 53

Savage v. Herrin Transfer & Warehouse Co., 219 S.W.2d 101 (Tex.Civ.App. Galveston 1949, no writ) 37

Schoenfeld v. State, 56 Tex. Crim. 103, 119 S.W. 101 ..... 36, 37

Sharkey v. State, 994 S.W.2d 417 (Tex.App. Texarkana 1999, no pet.) 27

Simon v. York Crane & Rigging Co., Inc., 739 S.W.2d 793, 795 (Tex. 1987) 9, 57

Spinks v. Matthews, 80 Tex. 373, 374, 12 S.W. 1101 ..... 38, 41

State v. Eversole, 889 S.W.2d 418 (Tex.App. Houston [14th dist.] 1995, review denied) 37, 50

State v. Gonzalez, 855 S.W.2d 692 (Tex.Crim.App. 1993) 35

State v. Rosenbaum, 910 S.W.2d 934 (Tex.Crim.App. 1995) 42, 43, 45

State v. Salinas, 1996 WL 477008 (Tex.App. Houston 1st dist., 1996 41

Stephenson v. Kirkhyam, 297 S.W. 265, 267 (Tex.Civ.App. San Antonio 1927, no writ) 27, 28, 32

Stone v. State, 823 S.W.2d 375, 381 (Pet. Ref'd) 49, 53

Templeton v. Giddings, 12 S.W. 851 (Tex. 1889) 27

Young v. State, 8 S.W.3d 656 (Tex.Crim.App. 2000) 8, 11, 19

FEDERAL CASES

Arizona v. Washington, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978) 27

Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056 (1969) 40, 44

City of Mesquite v. Alladin's Castle, Inc., 455 U.S. 283 ..... 45, 46

Crist v. Bretz, 437 U.S. 28, 33, 98 S.Ct. 2156, 2159 (1978) 53, 57

Duncan v. Louisiana, 391 U.S. 145 45

Marbury v. Madison, 5 U.S. (1 Cranch) 137 45

U. S. Balsys, 524 U.S. 666, 118 S.Ct. 2218 (1998) 44

United States v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed 2d 444 (1995) 27

Waldron v. United States, 516 U.S. 928, 116 S.Ct. 333, 133 L.Ed.2d 233 (1995) 57

TEXAS CODE OF CRIMINAL PROCEDURE

Art. 1.15 ..... 64, 65

Art. 38.03 57

Art. 40.001 ..... 44, 45

Art. 44.02 33

TEXAS RULES OF APPELLATE PROCEDURE

25.02 35

25.2(b)(3)(A), (B) or (C) 35

30(b) 44

25.02 27

25.2(b)(3)(A), (B) or (C) 33, 35

30(b) 27

TEXAS PENAL CODE

§2.01 64

§37.03 ..... 16, 27, 33, 36, 56, 61

§37.04 45

TEXAS RULES OF CIVIL PROCEDURE

Rule 18a(c) 44, 45

Rule 25.029(b)(3) 35

UNITED STATES CONSTITUTION

14th Amendment 17, 65

5th Amendment 46, 49

6th Amendment 45

IDENTITY OF PARTIES

The parties to the trial court judgment and the names and addresses of trial and appellate counsel are as follows:

Plaintiff: State of Texas

Defendant: Jay S. Fichtner

Plaintiff's counsel:

Dallas County Criminal District Attorney
Clark Birdsall
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SBN 15627400
14275 Midway Rd., Suite 220

56

Dallas, Texas 75001

TO HONORABLE JUDGE OF SAID COURT OF APPEALS:

Jay S. Fichtner, Appellant, files this appeal from a judgment of the 194th Judicial District Court of Dallas County, Texas, signed on March 12, 1999. In support of this appeal, Appellant respectfully shows the following:

Statement of the Case

Appellant was charged by indictment with aggravated perjury (CR 002). In a 1st jury trial, the trial court instructed the jury that the acts charged in the indictment were material as a matter of law (CR 141-150). The jury could not reach a verdict and was dismissed (CR 103, 140).

Following the 1st trial the presiding judge of the 194th District Court recused himself (CR 007), and a retired judge presided over post-recusal proceedings, except for signature and entry of a final judgment (CR 034). No order appointing the retired judge was signed by the Presiding Judge of the 1st Judicial Administrative District.

After four days of a 2nd jury trial Appellant entered into a plea bargain agreement under which he pled guilty to misdemeanor perjury and agreed to forfeit his Texas law license of 44 years (CR 033). The plea bargain agreement was signed on March 11, 1999, before the retired judge (CR 033) and a judgment was signed on March 12, 1999, by the judge who earlier had recused himself (CR 34-36).

Thereafter, Appellant filed a motion to retract the plea bargain agreement (CR 38-41) and filed a motion for new trial (CR 68-70). Following an extended presentation of evidence on the new trial motion (RR *Motion for New Trial Hearing*), it was denied (CR 54). Appellant requested permission to appeal (CR 063-066). The court granted Appellant's request as to those matters filed in writing before the time of the plea (RR *Motion for New Trial Hearing*, 123, II. 20-25; 124, II. 1-6). Appellant filed a timely notice of appeal (CR 68-71). Appellant's appeal has been delayed to give the district clerk and court reporters time to file their respective extensive records, the last portion of which was not filed until January 8, 2000.

Issues and Points Presented for Review
1st Issue or Point Presented for Review

Appellant's appeal is not limited by Rule 25.2(b)(3)(A), (B) or (C), *Texas Rules of Appellate Procedure* even though Appellant pled guilty pursuant to a plea bargain agreement because *the punishment assessed exceeded the punishment agreed to by the appellant;* the judgment is void or voidable for other material defects; the requirement that Appellant must have obtained the trial court's permission to appeal is void and unenforceable for vagueness and lack of adequate standards; and the opinion in *Young v. State*, 8 S.W.3d 656 (Tex.Crim.App. 2000) rendered by the Texas Court of Criminal Appeals on January 5, 2000.

2nd Issue or Point Presented for Review

This appeal charges jurisdictional and structural defects, the substance of which were raised by written pre-trial and trial motions, which questioned probability of cause for the indictment, constitutionality of §37.03 and §37.04, *Texas Penal Code*, because under the holding of *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed 2d 444 (1995), the sections violate Appellant's 5th, 6th and 14th Amendment rights to due process and jury trial.

3rd Issue or Point Presented for Review

The 2nd trial of Appellant's charges of aggravated perjury subjected him to double jeopardy, when the court in the 1st trial had instruct the jury that the acts charged against Appellant in the indictment were material, thereby causing a deadlocked jury which the court discharged without "manifest necessity."

4th Issue or Point Presented for Review

There was no probable cause for Appellant's indictment, which should have been quashed or dismissed upon Appellant's several pre-trial and trial motions.

5th Issue or Point Presented for Review

There is no evidence or insufficient evidence (1) that either Appellant's acts charged in the indictment was false or actionable, (2) that Appellant intended to deceive the court of appeals when he verified two statements charged in the indictment; or (3) that either of the two statements charged in the indictment was material to or could have affected the course or outcome of the appellate proceedings.

6th Issue or Point Presented for Review

Appellant's Motion for New Trial should have been granted because of newly discovered evidence, perjured, tainted or unreliable testimony of an 11 year old child, lack of a voluntary guilty plea, breach of the plea agreement, Appellant's retraction of his plea bargain agreement and in the interests of justice.

1st Issue or Point Presented for Review
(Restated)

Appellant's appeal is not limited by Rule 25.2(b)(3)(A), (B) or (C), *Texas Rules of Appellate Procedure*, even though Appellant pled guilty pursuant to a plea bargain agreement, because *the punishment assessed exceed the punishment . . . agreed to by the* appellant; the judgment is void or voidable for other material defects; the requirement that Appellant must have obtained the trial court's permission to appeal is void and unenforceable for vagueness and lack of adequate standards; and the opinion in *Young v. State*, rendered by the Texas Court of Criminal Appeals in January 5, 2000.

Statement and Argument in Support of 1st Point

A. Pre-Trial and Trial Proceedings

After a jury had been impaneled and 4 days of trial charges of aggravated perjury, Appellant pled guilty to misdemeanor perjury, pursuant to a plea bargain agreement (CR 033). Part of the plea agreement forced Appellant to forfeit his Texas law license, which he had held without blemish for 44 years (CR 033, RR 3/10/99: 59, II. 2-4). The indictment had arisen out of a child custody case in which Appellant had represented a widowed mother of two little girls in defense of a suit that sought appointment as their sole managing conservator, filed in the name of an aged, ill, Oklahoma paternal grandmother (Supplemental exhibit Volume [9], State's Exhibit No. 1, Ex. A [7 pages] & Ex. W [4 pages].

Immediately before Appellant's plea, the trial court had ruled (RR 3/11/99: 12, II. 19-24), that Appellant's client's oldest child, an 11 year old, would be allowed to testify before the jury. The child was living with the Oklahoma family, which had brought her from Oklahoma to court. The court allowed her to testify to unsubstantiated sexual abuse by her half-brother, and in connection with the unsubstantiated

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1. Hereinafter, SEV. The volume purports to be a copy of State Exhibit #1 and State Exhibit #2.

sexual abuse to testify that Appellant had told her to *change the story . . . to lie . . .* about what her *half-brother had done to her* (RR 3/10/99: 166, II. 21-25; 167, II 1-16; RR 167, II. 17-25; 170, II. 2-6) in the civil custody case. The evidence, even if true, was remote. The child said the alleged encounter had occurred *before Christmas* of 1996 (RR 3/10/99: 174, II. 15-22.[10] Even according to the child's confused and questionable testimony, the alleged events would have occurred more than 2 years prior to trial (RR 174, II. 15-22; 191, II. 12-25; 192, II. 1-12).

The child's testimony raised extraneous offenses; was immaterial and irrelevant to the State's charges; could not have been relevant to rebut Appellant's testimony because he had not opened the door to character evidence; and it was so emotionally charged that any probative value it may have had was overwhelmingly out-weighted by its adverse effect upon the jury. The child was also a surprise witness. The State had not listed the child as a witness in Appellant's 1st trial of the State's charges(CR Supp.#2, 042), and it had not given Appellant adequate notice in the 2nd trial to prepare an adequate response to the child's testimony in violation of pre-trial orders (Notice required: CR 1-120; State's witnesses: CR 1-123, Motion in Limine: CR1-130, CR 1-133; Extraneous offenses: CR 1-134, CR 1-137).

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2. Appellant was indicted July 11, 1996 (CR Supp. 001), and the 2nd trial started March 8, 1999.

Before the 2nd trial started, Appellant had objected to the State's proposed reference in opening statements to alleged, unsubstantiated sexual abuse of Appellant's client's children in the family law case (RR 3/9/99: 4, II. 13-25; 9, II. 11-14; 10, II. 18-23; 12, II. 20-25; 13, II. 1-18; 14, II. 3-7; 14, II. 13-16; 17, II. 16-24; 18, II. 1-24; 20, II. 3-6; 21, II. 12-16). The court sustained Appellant's objections, but reserved its ruling on admissibility of the evidence (RR 3/9/99: 26, II. 21-22; 27, I. 1; CR 007 [3-11-99 docket entry]). At the conclusion of the trial, the State tendered the child to testify after it had rested its case and Appellant was about to rest his. Appellant submitted vigorous oral and written objection, which the trial court overruled (CR Supp. #2, 008-013; CR 007 [Court's 3/11/99 docket entry]; RR 3/11/99, 11, II. 11-25; 12, Ii. 1-25).

B. Plea Bargain, Guilty Plea and Judgment

A *Plea Bargain Agreement* was signed and agreed to by Appellant on March 11, 1999, and approved by Hon. Robert Dohoney, Retired (CR 033). It provides that Appellant was to have testified, but Appellant did not testify at the plea hearing (RR, *Plea of Guilty*, 1/11/99). The agreement, as signed, contains no "√" on the line which recites, *confinement in [State Jail] [County Jail]*, and it reflects agreement that there was to have been *-0- days as a condition of Probation* (CR 033). The written judgment signed on March 12, 1999, by Judge Entz does not conform to the plea bargain agreement signed by Appellant on March 11th. Among other material discrepancies is the court's enhancement of punishment. The judgment states that Appellant's punishment is *assessed . . . at a fine of*

$300.00 and 1 (one) year confinement in the Dallas County jail (CR 034; emphasis added).

Judge Dohoney had presided during the trial, but on March 11th he did not sign a judgment. A written judgment, recorded in volume 404, page 23, of the court records, was not signed until March 12, 1999, and it bears the signature of Hon. Harold Entz (CR 034), who had not tried the case or engaged in the plea bargain proceedings. Furthermore, a document entitled, *Conditions of Community Supervision,* which is attached to and made part of the judgment, also was signed by Hon. Harold Entz, although he had recused himself from the case. Not only is the attachment signed by a recused jurist, it shows to have been signed by him on March 11, 1999, when he had not presided over the case, had not been in attendance at and had not participated in the plea bargain proceedings.

Appellant respectfully submits that the discrepancy in his motion filed on behalf of his client on June 14, 1996, for leave to file a mandamus proceeding makes him no more subject to a charge of perjury than discrepancies of record in the trial court at bar. Hon. Harold Entz's signature appears on an official document, which misrepresents the date upon which it was signed, and the signature, itself, is without authority, because Judge Entz had been recused and had not presided over trial of the case. Surely the impact of a recused judge, who had not presided over a trial, signing a final judgment in a criminal case could be far more harmful than Appellant's mischaracterization to this Honorable Court of a

document he had been led to believe had been signed by a trial judge. Appellant's efforts on behalf of a client were unrewarded and uncompensated. Because of the ineffectiveness of the document used before this court, it was useless and irrelevant. On the other hand, Judge Entz's impact on the validity and enforceability of the judgment in the case at bar can be far-reaching.

Lawyers and judges make innocent mistakes in courts all the time, and as in the case at bar the rules are versatile enough to accommodate innocent, unintentional mistakes. When lawyers and judges do err, however, they are not charged, indicted and subjected to criminal prosecution for aggravated perjury and stripped of their law licenses and livelihood, particularly when the error is traceable to an opposing counsel's failure to communicate.

Judge Entz had not tried the case. After he declared a mistrial and discharged the jury in the 1st trial, he recused himself from the case (CR 007). Before he recused himself, however, without prior notice to Appellant, he granted the State's motion to dismiss the indictment upon which the 1st trial had been based (CR 111). Then the State obtained a re-indictment of the same charge from another grand jury, without giving Appellant prior notice or an opportunity to appear before the 2nd grand jury (CR 002). The 2nd indictment also contains different terms from the 1st indictment.

As part of the appellate record at bar, Appellant requested the district clerk to include a copy of an order of the Judge of the 1st Administrative District appointing Judge Dohoney to replace Judge Entz as the trial judge (CR 75 [1st two items], items 3 [p & q] and items 4 [a & b], but Appellant was told that such an order could not be found, and therefore, as far as the trial record is concerned, there is no Administrative Judge's order appointing Judge Dohoney, as required by Rule 18a(c), *Texas Rules of Civil Procedure*.

C. **Post-Judgment Proceedings**

After a judgment was signed on March 12, 1999, and he had bowed to his criminal counsel's urgent recommendation to enter into a plea bargain, Appellant recognized the enormity and devastating consequences of his act, and he filed a motion to retract his plea bargain agreement (CR 038-041). Because of surprise and lack of time to prepare a defense, when mixed with stress and pressure to proceed with a jury under the circumstances, Appellant's plea truly had not been voluntary. Newly discovered evidence presented at the hearing of his motion for new trial overwhelmingly proved that testimony of the 11 year old child was false, contrived and fabricated by the Oklahoma paternal family.

Furthermore, Appellant had not been disciplined by the State Bar of Texas to have caused loss of his license to practice law. In fact, there is uncontradicted evidence in the

record that the State Bar found no grounds to discipline Appellant (CR 038-041).

Appellant's motion to withdraw his guilty plea was denied (CR 054). Appellant filed a motion for new trial (CR 049), supported by affidavits of the child's mother (CR 042-048) and Appellant's former legal assistant (CR 056-060) that directly contradict the child's fabrications. Additional, impartial, 3rd party evidence produced upon the new trial motion (*Motion or New Trial Hearing*, RR 5/24/99) affirmed the mother's and Appellant's secretary's affidavits. Appellant submits that the trial court committed reversible error in ruling that the 11 year old child's testimony was admissible. *Texas Rules of Evidence* Rule 404(b); see also, *Hines v. State*, 571 S.W.2d 322 (Tex.Crim.App. 1978); *Cameron v. State*, 530 S.W.2d 841 (Tex.Crim.App. 1975); *Alvarez v. State*, 511 S.W.2d 493 (Tex.Crim.App. 1974); *Haft v. State*, 416 S.W.2d 824 (Tex.Crim.App. 1967). The trial court committed reversible error in denying Appellant's new trial motion.

The following random excerpts of witnesses' testimony at Appellant's *Motion for New Trial Hearing*, show the deceptive and contrived nature of the evidence that the jury would have heard through the child.

Barry Coakley, Ph.D.:

1. Appointed by the trial court to do an evaluation of the child (RR 45, II. 6-8);
2. Found no proof of sexual abuse (RR 71, II. 5-9);

3. Child never said anything about Appellant asking her to lie or offering her money to lie (RR 71, II. 10-14, 22-25; 72, II. 2, 11-25, 73, 74, II. 17-21).

Justin Ezchoa

1. Employed by Dallas County Court Services to conduct social studies of families engaged in custody disputes (RR 107, II. 16-19));
2. Talked with the child, K.C. (RR 108, II. 9 -11);
3. The child never mentioned being offered money by Appellant or playing games in Appellant's office with chairs, to get her to testify in a particular way (RR 109, II. 1-14);
4. Ezcoha concluded that the child's report of sexual abuse was untrue (RR 109, I. 25; 110, II. 1-2);
5. The child's stories were conflicting (RR 110, II. 1-2);

Carol Ann Wilson

1. An attorney specializing in Family Law (RR 66, I. 10), who had assisted Appellant in the custody case;
2. Never met with the child in Appellant's office (RR 80, II. 19-23);
3. Never witnessed an offer by Appellant to pay K.C. $20 to testify in a certain way (RR 80, II. 24-25; 81, II. 1-5) nor witnessed Appellant and

K.C. playing with chairs in Appellant's office (RR 81, II. 7-11) nor witnessed Appellant ask K.C. to sign a paper (RR 81, II. 12-15).

Paula Marie Crank

1. The child's mother (RR 92, II. 24-25; 93, II. 1-2);
2. The child was in Appellant's office only 1 time (RR 94, II. 11-13);
3. The child was never out of mother's presence while in Appellant's office (RR 95, II. 4-6);
4. Appellant never offered money to the child to testify (RR 95, II. 7-10);
5. No role playing with chairs ever took place with the child in Appellant's office (RR 95, II. 11-13);
6. Appellant never asked the child to sign a piece of paper (RR 95, II. 14-16);
7. After her father's death and the child started visiting the paternal family in Oklahoma, she changed drastically in school and personal appearance (RR 96, II. 9-24);
8. After the child started visiting with her paternal family in Oklahoma, she began to lie about things (RR 98, II. 1-25; 99, II. 1-9). (See also testimony of her public school teachers, Peggy Joyce Williams and Cynthia Forbes. (RR 49-60).

Paul R. Shunatona

1. Practicing attorney (RR 114, II. 9-22);
2. Represents Katherine Crank, the paternal grandmother (RR 114, II. 15-20);
3. Represents Katherine crank, the paternal grandmother (RR 114, II. 15-20);
4. Admitted under oath that *there was no finding of sexual abuse in any court, not even in tribal court* (RR 118, II. 6-11);
5. Admitted that he does not *know of any physical evidence that has come into [his] possession that would indicate that Katrina Crank was sexually abused* (RR 119, II. 18-21);
6. Admitted that in tribal court Shunatona had testified that sexual abuse had never been proven (RR 119, II. 22-25).

After an *en camera* inspection of Texas Department of Protective and Regulatory Services records, **the trial court** also stated that as late as September 30, 1996, there is no evidence that sexual abuse had occurred (RR 105, II. 18-25; 106, II. 1-4).

The trial court denied Appellant's motion for new trial, and Appellant filed a motion for leave to appeal (CR 063-066), which was granted *as to those matters that have been filed in writing before the time of the plea* (RR, *Motion for New Trial Hearing*, 123, II. 24-25; 124, II. 1-2). Thereafter Appellant gave timely notice of appeal (CR 068).

D. Plea Bargain Agreement and Judgment

Must Be Compatible

Rule 25.02, *Tex.R.App.P.*, provides that a criminal defendant's right of appeal is limited if judgment is *rendered on [a] plea of guilty . . . [if] the punishment assessed did not exceed the punishment . . . agreed to by the defendant* (emphasis added). Art. 44.02, *C.C.P.*, contains identical language. The legislature appears to confirm that an agreement is synonymous with the word, *contract*, and if it is breached by the State or the court, which is required to approve it, the defendant's door to an appeal, not limited to jurisdictional or structural errors, is opened. Since punishment invoked in the judgment in the case at bar exceeds that to which Appellant agreed in writing, his plea bargain agreement is no bar to an appeal. On the contrary, breach of the plea bargain agreement is material and an independent ground for reversal of the trial court judgment. *Ervin v. State*, 1999 WL 10277 (Tex.Crim.App. 1999).

Without regard to Appellant's appellate rights arising out of breach of the plea bargain agreement, *Helms v. State*, 484 S.W.2d 924, 927 (Tex. Cr. App. 1972) has been overruled. In an opinion delivered on January 5, 2000, by the Texas Court of Criminal Appeals in *Young v. State*, all question of a defendant's appellate limitations have been resolved, and now he is permitted unlimited appeal, since it has followed a guilty plea given under a plea bargain agreement. Appellant respectfully submits that his guilty plea under a plea bargain is not a waiver of any rights on appeal and that he is not barred from raising all issues he might have raised had there been no guilty plea and plea bargain agreement.

There are additional, independent reasons to ignore Rule 25.029(b)(3), *Tex.R.Civ.P.* , and Art. 44.02, *C.C.P.*, and reverse the trial court judgment. The judgment at bar is signed by a judge who had recused himself and who had not presided over any of the trial proceedings. Rule 18a(c), *Tex.R.Civ.P.*, provides that *[i]f the judge recuses himself, he shall enter an order of recusal and request the presiding judge of the administrative judicial district to assign another judge to sit, and shall make no further orders and shall take no further action in the case except for good cause shown in the order in which such action is taken.*

Judge Entz recused himself after the 1st trial of Appellant's case, but he did not enter an order of recusal or request the presiding judge of the 1st Administrative District to replace him. Without apparent power or authority, he appointed Hon. Robert G. Dohoney, Retired, to preside over the 2nd trial (CR 007). Judge Dohoney was not an elected judge nor was he the sitting judge of another district court, and there is nothing in the record which reports an order of the 1st Administrative Judicial District appointing him to try the instant case (CR 074-076).

Judge Dohoney had no jurisdiction to preside at a trial of Appellant's case, because he was not duly and properly appointed according to the constitution and laws of the State of Texas, and all of his actions and rulings were void and a nullity. Judge Entz's signature on the final judgment voids that instrument, *ab initio*. The error is compounded because of

his recusal and failure to preside over trial. *Sharkey v. State*, 994 S.W.2d 417 (Tex.App. Texarkana 1999, no pet.); *Eubanks v. State*, 1999 WL 976163 (Tex.App. Texarkana 1999, no pet.); *Fry v. Tucker*, 202 S.W.2d 218, 221 (Tex. 1947); *Buckholts ISD, et al. V. Glaser*, 632 S.W.2d 146, 148 (Tex. 1982). An order of a constitutionally disqualified judge is "absolutely void," "a nullity." *Templeton v. Giddings*, 12 S.W. 851 (Tex. 1889); *Stephenson v. Kirkhyam*, 297 S.W. 265, 267 (Tex.Civ.App. San Antonio 1927, no writ).

In light of the *Young v. State, supra*, Appellant assumes that it was unnecessary for him to obtain the trial court's permission to appeal. However, Appellant respectfully submits that the statutory provision requiring a defendant to obtain a judge's permission to appeal is unconstitutional, because there are no definable, statutory guidelines to assist a judge in a decision. A judge is free to act subjectively, arbitrarily and capriciously in a grant or denial of permission to appeal. See *City of Mesquite v. Alladin's Castle, Inc.*, 455 U.S. 283, 290, 102 S.Ct. 1070, 1074, 71 L.Ed. 152 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, for the proposition that we '*are a government of laws, and not of men*')

Conclusion of 1st Issue

Appellant respectfully submits:

1. Although he pled guilty, he did so under a plea bargain agreement, and under the holding of *Young v. State, supra*, that he be granted the right to appeal any

issues he might have raised had he not entered a guilty plea, without regard to whether or not they are jurisdictional or structural;

2. The judgment should be reversed and the indictment quashed, because (a) Hon. Robert Dohney did not have jurisdiction to conduct a trial; (b) punishment contained in the judgment exceeds the punishment to which Appellant agreed; (c) it was signed by Hon. Harold Entz, who had recused himself and had not presided at trial.

2nd Issue or Point Presented for Review
(Restated)

This appeal charges jurisdictional and structural defects, the substance of which were raised by written pretrial and trial motions, which questioned probability of cause for the indictment, constitutionality of §37.03 and §37.04, *Texas Penal Code*, because under the holding of *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), the sections violate Appellant's 5th , 6th, and 14th Amendment rights to due process and jury trial.

3rd Issue or Point Presented for Review
(Restated)

The 2nd trial of Appellant's charges of aggravated perjury subjected him to double jeopardy, when the court in

the 1st trial had instructed the jury that the acts charged against Appellant in the indictment were material, thereby causing a deadlocked jury which the court discharged without "manifest necessity."

4th Issue or Point Presented for Review
(Restated)

There was no probable cause for Appellant's indictment, which should have been quashed or dismissed upon Appellant's several pretrial and trial motions.

Statement and Argument
of 2nd, 3rd and 4th Points

The indictment charges (CR 002) that in a document entitled *VERIFICATION (sic)* Appellant made a false statement under oath and swore to the truth of a false statement previously made with intent to deceive and with knowledge of the statement's meaning. It further charges that the *document was attached to and incorporated in a MOTION FOR LEAVE TO FILE A PETITION FOR WRIT OF MANDAMUS AND PETITION OF PROHIBITION WITH LEGAL AUTHORITIES* (sic). The indictment then defines the false statement as follows: *to wit, that the allegations of fact contained in these proceedings are true and correct.* **The indictment does not define the phrase, allegations of fact** nor the phrase, **these proceedings** (CR 002). Presumably it charges that the

allegations of fact in these proceedings are not true and correct, but the State offered no proof of such charges.

The text of the indictment switches, completely (CR 002) from the "document" it refers to as a *verification* to the *"said motion"* which presumably means the motion for leave to file a petition for writ of mandamus. In a *non sequitur* it charges that Appellant's argument that the mischaracterized "order" *does not specifically instruct peace officers of their duty in the event they take the children into possession,* is a false fact. The quoted phrase, which obviously is Appellant's interpretation of the mischaracterized order, does not appear in the *VERIFICATION (supra).*

The other false "statement" with which Appellant is charged with having made under oath, *with knowledge of its meaning and with intent to deceive* is in **said order.** However, *said order* does not appear in the verification, either. Thus, it the State had the burden to prove that the verification is false as to *said order,* which undoubtedly refers to the document Appellant mistakenly submitted to the court as the 301st District Court order of June 7, 1996.

The indictment chargesthat Appellant represented that *said order reads: "deliver the children safely [to this Court during regular court orders* (sic) *[Katrina Crank instanter]."* Appellant respectfully submits that the quote is true, not false. Appellant was referring to the document he was using in the appellate proceeding. It could only have been that "order,"

but an order not entered of record (and there was no order of record before the court", one only attached to an appellant's brief may not be considered. *Banowsky v. State Farm Ins. Co.*, 876 S.W.2d 509 (Tex.App. Amarillo 1994, no writ). Upon reflection, Appellant has concluded that the reason his application for leave to file a mandamus proceeding was his failure to attach a certified copy of an order to his pleadings.

The indictment is completely silent as to the terms of and does not even refer to an actual order signed on June 7, 1996, by the 301st District Court. Significant also is the indictment's failure to disclose that the *VERIFICATION* was Exhibit "U," one of a number of exhibits submitted to the appellate court in an *Appendix of Exhibits*. Appellant had fully disclosed to this Honorable Court that the documents in the *Appendix of Exhibits* were true only upon information and belief (*SEV.* Ex. "U"). So this Honorable Court is not misled by the State's selective, convoluted interpretation of the oath signed by Appellant, he quotes it in full (*SEV.* P. 9):

VERIFICATION

STATE OF TEXAS §
COUNTY OF DALLAS §

Before me, the undersigned authority, on this day personally appeared Jay S. Fichtner, who, being first by me duly sworn, upon oath deposes and says that he is the attorney for Paula M. Crank,

Relator; that he has authority to make this affidavit for and in her behalf; that the exhibits attached to this motion and contained in the "Appendix of Exhibits" which are attached and incorporated in these proceedings are true and correct to the best information and belief of affiant; that the allegations of fact contained in these proceedings are true and correct (Emphasis added).

/s/ Jay S. Fichtner

STATE OF TEXAS §
COUNTY OF DALLAS §

SUBSCRIBED AND SWORN TO before me, a Notary Public in and for the State of Texas, on this 14th day of June, 1996, to certify which witness my hand and official seal.

/s/ Anita H. Martinsen
Notary Public, State of Texas

The exhibits in the *Appendix of Exhibits* were only verified upon information and belief. Because the motion for leave to file mandamus proceeding was denied, under appellate court's rules and procedures then applicable, the *Appendix of Exhibits* was not filed (*SEV*, appellate docket sheet, [3 un-numbered pages in the copy provided to Appellant by the court reporter]).

Appellant filed a number of motions before trial to obtain dismissal of the indictment, but they were denied: *Motion to Dismiss Indictment as being Unconstitutional* (CR 023-028); *Defendant's Motion to Set Aside Indictment* (CR 085-087); *Addendum to Motions to Dismiss Indictments* (CR 108-110); *Motion to Dismiss Indictment Because of Double Jeopardy and Lack of Materiality* (CR Supp. #2 @ 34-35); *Motion to Determine Materiality and to Quash or Dismiss Indictment* (CR Supp. #2 @ 36-38).

There is no evidence of a *statement previously made* or that a *statement previously made* was false, as charged in the indictment. The State has the burden of proving beyond a reasonable doubt each of the elements of a crime.

It is a fundamental principle of law that a conditional verification or affidavit will not support a charge of perjury. *Graham v. McCarty*, 69 Tex. 323, 7 S.W. 342; *Burke v. Satterfield*, 525 S.W.2d 950, 955 (Tex. 1975). *Unless authorized by statute, an affidavit is insufficient unless the allegations therein are direct and unequivocal and perjury can be assigned upon it* (P. 954). See also, *Davis v. California Shoes, Inc.*, 612 S.W.2d 703, 704 (Tex.Civ.App. Dallas 1981, no writ).

Furthermore, acting as an attorney on behalf of his client, Appellant's statements about the mistaken order either were true as a repetition of its language or it was Appellant's legal interpretation of the meaning and impact of the language. The facts in *Schoenfeld v. State*, 56 Tex. Crim. 103,

119 S.W. 101, are similar in many respects to the facts at bar, because the opinion involves interpretation of a written document. The court held (p.108), *We think the rule is well settled and correctly settled that . . . where the statement which is the basis of the accusation is a matter of construction, or a deduction from given facts, the fact that it is erroneous, or is not a correct construction, or is not a logical deduction from all the facts cannot constitute it perjury or false swearing . . . Thus a misconception or mistake in swearing to the construction of a written instrument is not sufficient to warrant a conviction of perjury . . . perjury cannot be committed in testimony to the legal construction of a written instrument.* See also, *State v. Eversole,* 889 S.W.2d 418 (Tex.App. Houston [14th dist.] 1995, review denied); *Brasher v. State,* 715 S.W.2d 827, 831 (Tex.App. Houston [14th dist.] 1986, no petition).

Many authorities have declared that an affidavit must be disregarded unless the content is direct and unequivocal and perjury can be assigned upon it. *Brownlee v. Brownlee,* 665 S.W.2d 111 (Tex. 1984); *Burke v. Satterfield,* 525 S.W.2d 950 (Tex. 1975); *Savage v. Herrin Transfer & Warehouse Co.,* 219 S.W.2d 101 (Tex.Civ.App. Galveston 1949, no writ); *Bledsoe v. Mack,* 57 S.W.2d 869 (Tex.Civ.App. Galveston 1933, no writ). In an early supreme court decision, which is as applicable today as it was in 1891, Chief Justice Slayton wrote, *the general statement under oath that "the allegations are true and correct to the best of his knowledge and belief" is too general to constitute compliance with the law . . . the affidavit should show, substantially,*

that the party making it has knowledge himself of the facts. Spinks v. Matthews, 80 Tex. 373, 374, 12 S.W. 1101.

The quoted phrase, *the allegations of fact contained in these proceedings are true and correct* clearly refers to the proceedings before the court of appeals, but the indictment does not charge Appellant with a misstatement relating to the court of appeals proceedings. It only refers to events that allegedly had occurred in the trial court. The indictment does not charge that there was a factual error in the appellate court proceedings, and there is no evidence or insufficient evidence that Appellant made a factual misstatement about the proceedings before this Honorable Court. If the Appellant had done so, this court would have been the first to know, it could have taken actions to discipline Appellant, which it did not do.

Through pretrial motions, *supra*, Appellant brought to the attention of the trial court fundamental flaws in the indictment and sought to have it dismissed as a matter of law. The trial court denied all motions in which Appellant tried to persuade it that Appellant's verification upon information and belief will not support a charge of perjury; demonstrated that there is insufficient evidence that Appellant could have formed an intent to deceive, since the only evidence is that Shunatona had possession of the original, signed copy of Judge O'Connell's June 7, 1996, order (RR 3/10/99, 6 II. 2-5 [*I signed the order and gave it to Paul Shunatona*]; 7, II. 5-8; 7, II. 13-18; II. 10-11). Judge O'Donnell also testified that the order was

signed *past 4 or 5 o'clock . . . we were closing the courthouse* (RR 3/10/99, 6, II. 20-22). It must be remembered that the trial court out of which this appeal is made had the benefit of Shunatona's and Judge O'Donnell's sworn testimony in the 1st trial.

The motions argued that there is insufficient evidence beyond a reasonable doubt that Appellant's verification or the document Appellant believed to have been a trial court order could have affected the outcome of the appellate proceedings or trial proceedings. The motions also argued that the trial court's instruction on materiality in the 1st trial as a matter of law violated Appellant's 5th, 6th and 14th Amendment rights to due process and trial by jury of the material elements of aggravated perjury and had caused Appellant twice to be put in jeopardy of punishment for the same offense. The trial court erred in failing to dismiss or quash the indictment.

Without regard to evidence or lack thereof, the trial court erred in failing to dismiss or quash the indictment because it is founded upon an unconstitutional statute. Appellant was charged with aggravated perjury under §37.03 and §37.04, *Texas Penal Code*. The statute legislates that the issue of materiality, which is an essential element of the offense, be determined by the court as a matter of law, not a jury. In reliance upon the language of the statute, one or more of Appellant's motions asked the court to conduct a pretrial hearing to determine materiality, which the court refused to do.

However, in the 1st trial in 1997, the court instructed the jury on materiality as a matter of law, which Appellant submits led to a hung jury. The instructions was materially erroneous. It did not follow the mandate of Sec. 37.04(a) and did not ask the jury to return a verdict based upon the acts charged in the indictment, which if most liberally interpreted related only to the verification of the "order" Appellant used in his motion for leave to file a mandamus proceeding. However, the trial court submitted the entire packet of documents to the jury for consideration: *the document entitled 'Motion for leave to File a Petition for Writ of Mandamus and Petition for Writ of Prohibition with Legal Authorities' as a matter of law was of such a nature and content that it had a direct and immediate connection with a material fact or facts as to give weight tot he sworn content of the document presented to members of the 5th District Court of Appeals . . . Close of court finding with regard to this particular issue* (CR 142, II. 8-18). The instruction is facially erroneous if for no other reason than it fails to use the definition of materiality contained in the statute.

An indictment should be dismissed or quashed for lack of probable cause, when there is a substantive defect. *State v. Salinas*, 1996 WI, 477008 (Tex.App. Houston 1st dist., 1996; *State v. Eversole*, 889 S.W.2d 418 (Tex.App. Houston 14th dist. 1994, review refused). Among substantive defects inherent in the instant case is a legislatively mandated requirement of the aggravated perjury statute, §37.03 and §37.04, *Texas Penal Code*, that materiality be determined by the court as a *questions of law*. Acting in accordance with the code sections, Appellant

tried to obtain a pretrial hearing of materiality and tried to get the indictment dismissed or quashed. The trial court denied the motions, waited until the 1st jury trial was completed; announced that the Appellant's acts were material; and instructed the jury as a matter of law that the act was material (See pretrial motions, above; see, also, CR 139-151).

Appellant had relied upon the plain wording of *Texas Penal Code* §37.03 and §37.04 and the 1st opinion in *State v. Rosenbaum*, 910 S.W.2d 934 (Tex.Crim.App. 1995). *Rosenbaum* does not dispel the principle that under Texas law *materiality* is an element of the crime to be determined by the trial court without intervention of a jury. It merely holds that in making its determination a court may await presentation of all the evidence. It does not speak to the constitutionality of§37.04, which continues to require that the essential element of materiality be determined by the court as a matter of law and thus precludes a jury from passing upon the issue.

The court in *Rosenbaum* should have been aware of the Supreme Court's decision in *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), because it was published in May or June 1995, whereas the *Rosenbaum* decision did not come down until December 1995, unless the parties did not bring the Supreme Court decision to the attention of the Texas Court of Criminal Appeals. If proper procedure had been followed, Appellant submits that the Texas Court of Criminal Appeals would have held the aggravated perjury statute unconstitutional.

In *United States v. Gaudin*, 515 U.S. 506, 115 Sup.Ct. 2310, 2314, 132 L.Ed.2d 444, Justice Scalia, speaking for the Supreme Court, announced that a defendant has a constitutional right under the 5th and 6th Amendments to the U. S. Constitution to have all elements of a crime submitted to a jury. *Materiality* is one of the elements of aggravated perjury, the crime for which Appellant was indicted and tried. Through the provisions of the 14th Amendment, the states are subject to the due process provisions of the 5th Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 159, 88 S.Ct. 1444, 1447, 20 L.Ed.2d 491 (1968); *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056 (1969); *U. S. Balsys*, 524 U.S. 666, 118 S.Ct. 2218 (1998).

The Supreme Court decision in *United States v. Gaudin*, holds that because materiality of a false statement is an essential element of the crime of perjury, it must be submitted to a jury. See also, *Waldron v. United States*, 516 U.S. 928, 116 S.Ct. 333, 133 L.Ed.2d 233 (1995).

Appellant had moved the trial court in the 1st trial to dismiss or quash the indictment on constitutional grounds, among others. (See pre-trial motions listed above). §37.03 and §37.04, *Texas Penal Code*, clearly are unconstitutional, because they contradict and are in direct conflict with the *Gaudin* opinion and the 5th, 6th and 14th Amendments to the U. S. Constitution, and the trial court committed reversible error in failing to dismiss the indictment.

To Appellant's knowledge no court of appeals or the Texas Court of Criminal Appeals has yet to directly address the impact upon §37.03 and §37.04 of the decision in *Gaudin*. However obedience by all courts to the 5th, 6th and 14th Amendments to the U. S. Constitution being required, Appellant respectfully submits that until the legislature modifies the sections, they are unenforceable. As a mater of fact, the opinion in *Bonilla v. State*, 933 S.W.2d 538, 543 (Tex.App. Houston [1st dist.] 1996, no pet.) noted, *We agree with appellant that Gaudin implicates the constitutionality of section 37.04(c) of the Texas Penal code,* but because the defensive issue had been *raised for the time in his motion for rehearing and [i] in his points of error, appellant challenged only the sufficiency of the evidence* (p. 544), the court declined to review the issue. In a concurring opinion Justice Cohen wrote (p. 544): *I agree with appellant that Texas Penal Code Ann. §37.04(c) (Vernon 1994) is unconstitutional for the reasons stated in United States v. Gaudin.*

Appellant's right to protection from double jeopardy was violated when the court in the 1st trial dismissed the jury. There was not a manifest necessity to discharge the jury. It allowed the State, without prior notice to Appellant, to obtain an amended indictment from another grand jury. The State had failed to introduce sufficient evidence of Appellant's intent to deceive or that his verification would support a charge of perjury. Further, the court's charge to the jury on materiality was fatally defective.

It is long established that jeopardy may attach in a trial that ends inconclusively or without a verdict. *Crist v. Bretz*, 437 U.S. 28, 33, 98 S.Ct. 2156, 2159 (1978); see also, *Arizona v. Washington*, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978). The Federal rule that jeopardy attaches when a jury is impaneled and sworn is applicable to the states by the 14th Amendment. Discharge of the jury and dismissal of the first case allowed the State to continue harassing Appelant by obtaining another defective indictment, under the same facts, under the same statute, without probable cause.

Conclusion of 2nd, 3rd and 4th Points

Appellant's mistaken use of a document he believed was an order signed by a trial court cannot support perjury, because Appellant never made an unqualified representation to the appellate court that the document was a true and correct copy of a trial court order and it was not certified by the district clerk. Appellant's discussion of the terms of the document was not a statement of fact but in the nature of legal interpretation or argument, which will not support a charge of perjury.

Without regard to the foregoing, and without waiver, Appellant submits that the Texas aggravated perjury statute is unconstitutional, void and unenforceable and a 2nd trial of Appellant on aggravated perjury charges after the trial court's erroneous jury instruction in the 1st trial subjected Appellant to double jeopardy in violation of the 5th and 14th Amendments

to the U. S. Constitution. For all of the foregoing reasons, the indictment should have been quashed or dismissed.

5th Issue or Point Present
for Review
(Restated)

There is no evidence or insufficient evidence (1) that either Appellant's acts charged in the indictment were false or actionable; (2) that Appellant intended to deceive the court of appeals when he verified two statements charged in the indictment; or (3) that either of the two statements charged in the indictment was material to or could have affected the course or outcome of the appellate proceedings.

Statement and Argument of 5th Point

Appellant adopts and incorporates statements and arguments made in previous issues and points in this brief.

§2.01, *Texas Penal Code,* provides:

All persons are presumed to be innocent and no person may be convicted of an offense unless ***each element*** *of the offense is proved beyond a reasonable doubt. The fact that he has been . . . indicted for . . . the offense gives rise to no inference of guilt at his trial* (emphasis added).

Art. 38.03, *Texas Code of Criminal Procedure,* prescribes:

The defendant in a criminal case is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt, and in case of reasonable doubt as to his guilt, he is entitled to be acquitted.

Art. 1.15, *Texas Code of Criminal Procedure*, mandates that in cases where the defendant elects to plead guilty to a criminal offense, . . . *it shall,* (however) *be necessary for the state to introduce evidence into the record showing the guilt of the defendant and said evidence shall be accepted by the court as the basis for its judgment. In no event shall a person charged be convicted upon his* (guilty) *plea without sufficient evidence to support the same.*

If there is no evidence or insufficient evidence to support an essential element of a crime, fundamental error exists, and the court may review the error in the interest of justice. *Carter v. State*, 565 S.W.2d 468 (Tex.Crim.App. 1983). To determine whether evidence is factually sufficient, an appellate court must consider all the evidence *without the prism of 'in the light most favorable to the prosecution,' and it sets aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Clewis v. State*, 922 S.W.2d 126 (Tex.Crim.App. 1996), quoting from *Stone v. State*, 823 S.W.2d 375, 381 (Pet. Ref'd). An appellate court shall consider the legal sufficiency on constitutional grounds, as well as the factual sufficiency of the evidence. *Clewis, supra.*)

Although a defendant does not have the burden of showing "lack of evidence" to prevail upon grounds that the evidence was insufficient, Appellant submits at bar that there is such a dearth of credible, probative evidence of Appellant's knowledge of hand-written changes made by the 301st court to the proposed order given to him by opposing counsel that it is tantamount to no evidence. There is no evidence or insufficient evidence that Appellant had knowledge that the document that had been handed to him by the opposing lawyer did not conform to the original. Without knowledge, he could not have formed the requisite intent to mislead or deceive. Another way of phrasing it is to say that **Appellant truly did not know the meaning** of the document he mistakenly submitted to the court, and there is no evidence or insufficient evidence that he knew the document he was using had a meaning different form the original. The State had the burden of presenting evidence beyond a reasonable doubt that Appellant knew or understood the meaning of the document he was using. It failed to do so.

Appellant thought that it was an order of the 301st court which meant that it was unenforceable because of contradictions and understood that if he could convince this court that the submitted document was unenforceable, it would instruct the judge of the 301st Court to refrain from enforcing the presented "order." As is now known, Appellant's understanding of the document was incorrect, and even had he been successful before this Honorable Court, an order to the trial court would have been meaningless.

There is no evidence or insufficient evidence that on June 14, 1996, when he filed the mandamus proceeding issue, Appellant was anything other than ignorant of the content and meaning of the order signed on June 7, 1996.

Under oath Paul R. Shunatona, Appellant's opposing counsel, admitted that he had prepared a draft of an order to submit to the 301st Court on June 7, 1996. At the court's discretion he handed a copy of the draft to Appellant. As he engaged the judge at the bench to obtain his signature, Appellant gathered his papers and left the courtroom. Changes were made to the draft at the bench by the judge in his own handwriting, who then returned the original, only copy of the signed order to Shunatona. It was late on a Friday afternoon. The beginning of a weekend, the afternoon of June 7, 1996. Appellant was not at the bench at any time. There is no evidence that the signed order reached the clerk of the court before June 14, 1996. The only evidence is that Shunatona is the last person to have had possession of the order bearing Judge O'Donnell's original signature on June 7, 1996.

Shunatona admitted under oath that he had not provided Appellant with a conformed copy of the June 7th order and **at no time** did Shunatona otherwise communicate with Appellant relating to the order. Judge O'Donnell, who appeared as a witness on Appellant's behalf, testified that after he had rendered his order, it was not read aloud in court (RR 3/10/99, 45 II. 11-22).

The State failed to present evidence of the chain of possession of the order. Other than Judge O'Donnell's testimony that after he signed it, he handed it back to Shunatona, there is no evidence that before June 14, 1996, it was delivered to the clerk of the 301st Court or any other court official. There is no evidence of when or by whom the order was enrolled in the records of the 301st Court or the process or length of time it took to enroll it. **There is no probative evidence that between June 7, 1996 and June 14, 1996, the signed order would even have been available to Appellant, if he had wanted to compare it with the copy handed to him by Shunatona before the judge signed the original.**

Furthermore, there is no evidence or insufficient evidence, direct or circumstantial, of the extent to which the mistaken "order" was material to this court. A statement is *material* for purposes of §37.04, *Texas Penal Code*, if it *could have affected the course or outcome of the official proceeding*. For a statement to be material, it *must be related to the decision making process of the proceeding* [and must have] *a substantial potential for obstructing justice. Mitchell v. State*, 608 S.W.2d 228 (Tex.Crim.App. 1980). This court's record of cause No. 05-96-00890-CV shows that Appellant's motion for leave to file a petition for writ of mandamus was denied on June 14, 1996, the same day it was filed (*SEV*, docket sheet [3 pages] and that an order was signed by Justice Deborah G. Hankinson without opinion or comment (*SEV*, Order).

The State did not call as a witness any member or legal assistant of the 5th District Court of Appeals. There is not a shred of probative evidence from the appellate court that Appellant's information and belief representations were material.

Conclusion of 5th Point

There is insufficient credible, probative evidence that Appellant knew the meaning of the document he used as a trial court order; that he intended to deceive this Honorable Court; that his verification or presentation of a document as a trial court order was material. There is no evidence that between June 7, 1996, and June 14, 1996, a copy or the terms of the order, as signed by Hon. Bob O'Donnell, were communicated to Appellant.

6th Issue or Point
Presented for Review
(Restated)

Appellant Motion for New Trial should have been granted because of newly discovered evidence, perjured, tainted or unreliable testimony of an 11 year old child, lack of a voluntary guilty plea, breach of the plea bargain agreement, Appellant's retraction of his plea bargain agreement and in the interest of justice.

Statement and Argument

of 6th Point

Appellant adopts and incorporates statements and arguments made under previous issues or points.

The standard of review of a trial court's judgment relating to a motion for new trial is abuse of discretion. *State v. Gonzalez*, 855 S.W.2d 692 (Tex.Crim.App. 1993). Art. 40.001, *Code of Criminal Procedure*, provides that a new trial shall be granted where material evidence favorable to an accused has been discovered since trial.

The Texas Court of Criminal Appeals opinion in *State v. Gonzales* cites the opinion of this Honorable Court in the same case for the proposition that a trial court has discretion to grant a new trial in the interest of justice (694):

> . . . *the Court of appeals* [5th District] *held Rule 30(b)* [Texas Rules of Appellate Procedure] *did not provide an exclusive list for the granting of a motion for new trial . . . The Court of Appeals, citing Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 918 (Tex. 1985) and Champion Int'l Corp. v. Twelfth Court of Appeals, 762 S.W.2d 898, 899 (1988) concluded that a trial judge may, in his discretion, grant a new trial in the interest of justice . . . For more than one hundred and twenty years, our trial judges have had the discretion to grant new trial in the interest of justice . . .* [it] *is*

> *almost the only protection to the citizen against illegal or oppressive verdicts of prejudice, careless or ignorant juries, and we think that the District Court should never hesitate to use that discretion whenever the ends of justice have not been attained by those verdicts.*

Material evidence set forth in foregoing issues in this brief demonstrate that the trial court abused its discretion in failing to grant Appellant's motion for new trial. This Honorable Court and the Texas Court of Criminal Appeals approved a trial court's grant of a motion for new trial under facts and circumstances much less compelling than those that exist at bar. Appellant's motion for new trial is extensive in its content and scope, and many witnesses and evidence were produced at the new trial hearing, as opposed to only one in *Gonzalez*.

The party that complains of abuse of discretion has the burden to bring forth a record showing such abuse. Simon v. York Crane & Rigging Co., Inc., 739 S.W.2d 793, 795 (Tex. 1987). Appellant respectfully submits that he has met the burden. The record at bar is replete with error that warrants a new trial. In the interests of justice the trial court's decision to deny a new trial should be reversed.

Conclusion of 6th Point

The trial court abused its discretion in failing to grant Appellant's motion for new trial, if not for the great number of errors in the record, because Appellant has suffered great harm. He has lost his right to practice law in the State of Texas and the livelihood he has known since 1955. There is insufficient evidence that Appellant was aware of the meaning of the document presented on appeal as a trial court order; there is insufficient evidence that his presentation of the document as charged was false; there is insufficient evidence of intent to deceive; and all the evidence supports the proposition that there was not an unqualified swearing, but only as to information an belief.

There is no specific list of errors required to support grant of a motion for new trial, and the trial court should have granted a new trial in the interests of justice, if for no other reason.

CONCLUSION

Appellant, who was ignorant of the true content of an order signed by the 301st District Court on June 7, 1996, foolishly believed that ethics of the legal profession would have required opposing counsel to inform him that the court order, as signed, was different from the copy Appellant had received. Actually, Shunatona did not even have to educate Appellant. All he had to do was to send a copy of the signed order to Appellant, but he intentionally suppressed the changes made to his draft by Judge O'Donnell, and there is no

way of telling from the evidence he held the original order. Appellant does not know to this very day.

Appellant has not been able to determine the forces that have motivated prosecution of this convoluted case by the District Attorney of a fellow lawyer. There is no evidence that the appellant enjoyed financial or other gain from his action on behalf of a poor client to retain her two children. A great injustice was done when Appellant was forced to plead guilty to a crime of which he is innocent, and to have lost his license to practice law, was akin to a death knell for one who had done nothing but follow the legal profession for his entire working life. Embarrassment, shame and frustration are only part of the pain, loss and heartbreak suffered by Appellant and his family. Through this appeal, Appellant hopes to obtain some vindication and reinstatement of his lawful place in the legal community.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellant prays that the judgment of the trial court be reversed; that all charges be dismissed or quashed; in the alternative, that this case be remanded for a new trial. Appellant further prays for such special and general, legal and equitable relief to which he is entitled under the law.

/s/

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Certificate of Service

This is to certify that on the 7th day of February, 2000, a copy of the foregoing was served upon the Criminal District Attorney of Dallas County, Texas, buy depositing it postage prepaid in the U. S. Postal Service, addressed to Hon. Bill Hill, Frank Crowley Criminal Courts Building, 133 Harry Hines Blvd., Dallas, Texas 75207.

/s/
Jay S. Fichtner

Appendix No. 9

NO. 05-99-01053

IN THE COURT OF APPEALS

FIFTH DISTRICT OF TEXAS

JAY SHELDON FICHTNER

V.

THE STATE OF TEXAS

ON APPEAL FROM THE 194TH JUDICIAL DISTRICT
COURT OF DALLAS COUNTY, TEXAS
TRIAL CAUSE NOS. F97-03659-KM AND F96-02329-UM

APPELLANT'S ORIGINAL BRIEF
ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF CONTENTS 1

IDENTITY OF PARTIES 12

Statement of the Case 14

Issues and Points Presented for Review 16

1st Issue or Point Presented for Review 16
2nd Issue or Point Presented for Review 16
3rd Issue or Point Presented for Review 17
4th Issue or Point Presented for Review 17
5th Issue or Point Presented for Review 17
6th Issue or Point Presented for Review 18
1st Issue or Point Presented for Review 18
Statement and Argument in Support of 1st Point 19
Conclusion of 1st Issue 36

2nd Issue or Point Presented for Review 37
3rd Issue or Point Presented for Review 37

4th Issue or Point Presented for Review 38
Statement and Argument of 2nd, 3rd and 4th Points 38
Conclusion of 2nd, 3rd and 4th Points 54
5th Issue or Point Present for Review 55
Statement and Argument of 5th Point 56
Conclusion of 5th Point 62
6th Issue or Point Presented for Review 62
Statement and Argument of 6th Point 63
Conclusion of 6th Point 65

CONCLUSION 66

PRAYER 67

Certificate of Service 68

TABLE OF AUTHORITIES

TEXAS CASES

Alvarez v. State, 511 S.W.2d 493 (Tex.Crim.App. 1974) 16

Banowsky v. State Farm Ins. Co., 876 S.W.2d 509 (Tex.App. Amarillo 1994, no writ) 32, 36

Bledsoe v. Mack, 57 S.W.2d 869 (Tex.Civ.App. Galveston 1933, no writ) 37, 38

Bonilla v. State, 933 S.W.2d 538, 543 (Tex.App. Houston [1st dist.] 1996, no pet.) 45, 49

Brasher v. State, 715 S.W.2d 827, 831 (Tex.App. Houston [14th dist.] 1986, no petition) 37

Brownlee v. Brownlee, 665 S.W.2d 111 (Tex. 1984) 37

Buckholts ISD, et al. V. Glaser, 632 S.W.2d 146, 148 (Tex. 1982) 37

Burke v. Satterfield, 525 S.W.2d 950, 955 (Tex. 1975) 36

Cameron v. State, 530 S.W.2d 841 (Tex.Crim.App. 1975) 19

Carter v. State, 565 S.W.2d 468 (Tex.Crim.App. 1983) 49

Champion Int'l Corp. v. Twelfth Court of Appeals, 762 S.W.2d 898, 899 (1988) 56, 57

Clewis v. State, 922 S.W.2d 126 (Tex.Crim.App. 1996) 49

Davis v. California Shoes, Inc., 612 S.W.2d 703, 704 (Tex.Civ.App. Dallas 1981, no writ) 36, 37, 44

Ervin v. State, 1999 WL 10277 (Tex.Crim.App. 1999) 25

Eubanks v. State, 1999 WL 976163 (Tex.App. Texarkana 1999, no pet.) 27

Fry v. Tucker, 202 S.W.2d 218, 221 (Tex. 1947) 27

Graham v. McCarty, 69 Tex. 323, 7 S.W. 342 36

Haft v. State, 416 S.W.2d 824 (Tex.Crim.App. 1967) 19

Helms v. State, 484 S.W.2d 924, 927 (Tex. Cr. App. 1972) 25, 27

Hines v. State, 571 S.W.2d 322 (Tex.Crim.App. 1978) 19

Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 918 (Tex. 1985) 56

Mitchell v. State, 608 S.W.2d 228 (Tex.Crim.App. 1980) 53

Savage v. Herrin Transfer & Warehouse Co., 219 S.W.2d 101 (Tex.Civ.App. Galveston 1949, no writ) 37

Schoenfeld v. State, 56 Tex. Crim. 103, 119 S.W. 101 ..... 36, 37

Sharkey v. State, 994 S.W.2d 417 (Tex.App. Texarkana 1999, no pet.) 27

Simon v. York Crane & Rigging Co., Inc., 739 S.W.2d 793, 795 (Tex. 1987) 9, 57

Spinks v. Matthews, 80 Tex. 373, 374, 12 S.W. 1101 ..... 38, 41

State v. Eversole, 889 S.W.2d 418 (Tex.App. Houston [14th dist.] 1995, review denied) 37, 50

State v. Gonzalez, 855 S.W.2d 692 (Tex.Crim.App. 1993) 35

State v. Rosenbaum, 910 S.W.2d 934 (Tex.Crim.App. 1995) 42, 43, 45

State v. Salinas, 1996 WL 477008 (Tex.App. Houston 1st dist., 1996 41

Stephenson v. Kirkhyam, 297 S.W. 265, 267 (Tex.Civ.App. San Antonio 1927, no writ) 27, 28, 32

Stone v. State, 823 S.W.2d 375, 381 (Pet. Ref'd) 49, 53

Templeton v. Giddings, 12 S.W. 851 (Tex. 1889) 27

Young v. State, 8 S.W.3d 656 (Tex.Crim.App. 2000) 8, 11, 19

FEDERAL CASES

Arizona v. Washington, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978) 27

Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056 (1969) 40, 44

City of Mesquite v. Alladin's Castle, Inc., 455 U.S. 283 ..... 45, 46

Crist v. Bretz, 437 U.S. 28, 33, 98 S.Ct. 2156, 2159 (1978) 53, 57

Duncan v. Louisiana, 391 U.S. 145 45

Marbury v. Madison, 5 U.S. (1 Cranch) 137 45

U. S. Balsys, 524 U.S. 666, 118 S.Ct. 2218 (1998) 44

United States v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed 2d 444 (1995) 27

Waldron v. United States, 516 U.S. 928, 116 S.Ct. 333, 133 L.Ed.2d 233 (1995) 57

TEXAS CODE OF CRIMINAL PROCEDURE

Art. 1.15 ..... 64, 65

Art. 38.03 57

Art. 40.001 ..... 44, 45

Art. 44.02 33

TEXAS RULES OF APPELLATE PROCEDURE

25.02 35

25.2(b)(3)(A), (B) or (C) 35

30(b) 44

25.02 27

25.2(b)(3)(A), (B) or (C) 33, 35

30(b) 27

TEXAS PENAL CODE

§2.01 64

§37.03 ..... 16, 27, 33, 36, 56, 61

§37.04 45

TEXAS RULES OF CIVIL PROCEDURE

Rule 18a(c) 44, 45

Rule 25.029(b)(3) 35

UNITED STATES CONSTITUTION

14th Amendment 17, 65

5th Amendment 46, 49

6th Amendment 45

IDENTITY OF PARTIES

The parties to the trial court judgment and the names and addresses of trial and appellate counsel are as follows:

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110

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TO HONORABLE JUDGE OF SAID COURT OF APPEALS:

Jay S. Fichtner, Appellant, files this appeal from a judgment of the 194th Judicial District Court of Dallas County, Texas, signed on March 12, 1999. In support of this appeal, Appellant respectfully shows the following:

Statement of the Case

Appellant was charged by indictment with aggravated perjury (CR 002). In a 1st jury trial, the trial court instructed the jury that the acts charged in the indictment were material as a matter of law (CR 141-150). The jury could not reach a verdict and was dismissed (CR 103, 140).

Following the 1st trial the presiding judge of the 194th District Court recused himself (CR 007), and a retired judge presided over post-recusal proceedings, except for signature and entry of a final judgment (CR 034). No order appointing the retired judge was signed by the Presiding Judge of the 1st Judicial Administrative District.

After four days of a 2nd jury trial Appellant entered into a plea bargain agreement under which he pled guilty to misdemeanor perjury and agreed to forfeit his Texas law license of 44 years (CR 033). The plea bargain agreement was signed on March 11, 1999, before the retired judge (CR 033) and a judgment was signed on March 12, 1999, by the judge who earlier had recused himself (CR 34-36).

Thereafter, Appellant filed a motion to retract the plea bargain agreement (CR 38-41) and filed a motion for new trial (CR 68-70). Following an extended presentation of evidence on the new trial motion (RR *Motion for New Trial Hearing*), it was denied (CR 54). Appellant requested permission to appeal (CR 063-066). The court granted Appellant's request as to those matters filed in writing before the time of the plea (RR *Motion for New Trial Hearing*, 123, II. 20-25; 124, II. 1-6). Appellant filed a timely notice of appeal (CR 68-71). Appellant's appeal has been delayed to give the district clerk and court reporters time to file their respective extensive records, the last portion of which was not filed until January 8, 2000.

Issues and Points Presented for Review
1st Issue or Point Presented for Review

Appellant's appeal is not limited by Rule 25.2(b)(3)(A), (B) or (C), *Texas Rules of Appellate Procedure* even though Appellant pled guilty pursuant to a plea bargain agreement because *the punishment assessed exceeded the punishment agreed to by the appellant;* the judgment is void or voidable for other material defects; the requirement that Appellant must have obtained the trial court's permission to appeal is void and unenforceable for vagueness and lack of adequate standards; and the opinion in *Young v. State*, 8 S.W.3d 656 (Tex.Crim.App. 2000) rendered by the Texas Court of Criminal Appeals on January 5, 2000.

2nd Issue or Point Presented for Review

This appeal charges jurisdictional and structural defects, the substance of which were raised by written pre-trial and trial motions, which questioned probability of cause for the indictment, constitutionality of §37.03 and §37.04, *Texas Penal Code*, because under the holding of *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed 2d 444 (1995), the sections violate Appellant's 5th, 6th and 14th Amendment rights to due process and jury trial.

3rd Issue or Point Presented for Review

The 2nd trial of Appellant's charges of aggravated perjury subjected him to double jeopardy, when the court in the 1st trial had instruct the jury that the acts charged against Appellant in the indictment were material, thereby causing a deadlocked jury which the court discharged without "manifest necessity."

4th Issue or Point Presented for Review

There was no probable cause for Appellant's indictment, which should have been quashed or dismissed upon Appellant's several pre-trial and trial motions.

5th Issue or Point Presented for Review

There is no evidence or insufficient evidence (1) that either Appellant's acts charged in the indictment was false or actionable; (2) that Appellant intended to deceive the court of appeals when he verified two statements charged in the indictment; or (3) that either of the two statements charged in the indictment was material to or could have affected the course or outcome of the appellate proceedings.

6th Issue or Point Presented for Review

Appellant's Motion for New Trial should have been granted because of newly discovered evidence, perjured, tainted or unreliable testimony of an 11 year old child, lack of a voluntary guilty plea, breach of the plea agreement, Appellant's retraction of his plea bargain agreement and in the interests of justice.

1st Issue or Point Presented for Review
(Restated)

Appellant's appeal is not limited by Rule 25.2(b)(3)(A), (B) or (C), *Texas Rules of Appellate Procedure*, even though Appellant pled guilty pursuant to a plea bargain agreement, because *the punishment assessed exceed the punishment . . . agreed to by the* appellant; the judgment is void or voidable for other material defects; the requirement that Appellant must have obtained the trial court's permission to appeal is void and unenforceable for vagueness and lack of adequate standards; and the opinion in *Young v. State*, rendered by the Texas Court of Criminal Appeals in January 5, 2000.

Statement and Argument
in Support of 1st Point

A. Pre-Trial and Trial Proceedings

After a jury had been impaneled and 4 days of trial charges of aggravated perjury, Appellant pled guilty to misdemeanor perjury, pursuant to a plea bargain agreement (CR 033). Part of the plea agreement forced Appellant to forfeit his Texas law license, which he had held without blemish for 44 years (CR 033, RR 3/10/99: 59, II. 2-4). The indictment had arisen out of a child custody case in which Appellant had represented a widowed mother of two little girls in defense of a suit that sought appointment as their sole managing conservator, filed in the name of an aged, ill, Oklahoma paternal grandmother (Supplemental exhibit Volume [1], State's Exhibit No. 1, Ex. A [7 pages] & Ex. W [4 pages].

Immediately before Appellant's plea, the trial court had ruled (RR 3/11/99: 12, II. 19-24), that Appellant's client's oldest child, an 11 year old, would be allowed to testify before the jury. The child was living with the Oklahoma family, which had brought her from Oklahoma to court. The court allowed her to testify to unsubstantiated sexual abuse by her half-brother, and in connection with the unsubstantiated

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1. Hereinafter, SEV. The volume purports to be a copy of State Exhibit #1 and State Exhibit #2.

sexual abuse to testify that Appellant had told her to *change the story . . . to lie . . .* about what her *half-brother had done to her* (RR 3/10/99: 166, II. 21-25; 167, II 1-16; RR 167, II. 17-25; 170, II. 2-6) in the civil custody case. The evidence, even if true, was remote. The child said the alleged encounter had occurred *before Christmas* of 1996 (RR 3/10/99: 174, II. 15-22.[12] Even according to the child's confused and questionable testimony, the alleged events would have occurred more than 2 years prior to trial (RR 174, II. 15-22; 191, II. 12-25; 192, II. 1-12).

The child's testimony raised extraneous offenses; was immaterial and irrelevant to the State's charges; could not have been relevant to rebut Appellant's testimony because he had not opened the door to character evidence; and it was so emotionally charged that any probative value it may have had was overwhelmingly out-weighted by its adverse effect upon the jury. The child was also a surprise witness. The State had not listed the child as a witness in Appellant's 1st trial of the State's charges (CR Supp.#2, 042), and it had not given Appellant adequate notice in the 2nd trial to prepare an adequate response to the child's testimony in violation of pre-trial orders (Notice required: CR 1-120; State's witnesses: CR 1-123, Motion in Limine: CR1-130, CR 1-133; Extraneous offenses: CR 1-134, CR 1-137).

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2. Appellant was indicted July 11, 1996 (CR Supp. 001), and the 2nd trial started March 8, 1999.

Before the 2nd trial started, Appellant had objected to the State's proposed reference in opening statements to alleged, unsubstantiated sexual abuse of Appellant's client's children in the family law case (RR 3/9/99: 4, II. 13-25; 9, II. 11-14; 10, II. 18-23; 12, II. 20-25; 13, II. 1-18; 14, II. 3-7; 14, II. 13-16; 17, II. 16-24; 18, II. 1-24; 20, II. 3-6; 21, II. 12-16). The court sustained Appellant's objections, but reserved its ruling on admissibility of the evidence (RR 3/9/99: 26, II. 21-22; 27, I. 1; CR 007 [3-11-99 docket entry]). At the conclusion of the trial, the State tendered the child to testify after it had rested its case and Appellant was about to rest his. Appellant submitted vigorous oral and written objection, which the trial court overruled (CR Supp. #2, 008-013; CR 007 [Court's 3/11/99 docket entry]; RR 3/11/99, 11, II. 11-25; 12, II. 1-25).

B. Plea Bargain, Guilty Plea and Judgment

A *Plea Bargain Agreement* was signed and agreed to by Appellant on March 11, 1999, and approved by Hon. Robert Dohoney, Retired (CR 033). It provides that Appellant was to have testified, but Appellant did not testify at the plea hearing (RR, *Plea of Guilty*, 1/11/99). The agreement, as signed, contains no "√" on the line which recites, *confinement in [State Jail] [County Jail]*, and it reflects agreement that there was to have been *-0- days as a condition of Probation* (CR 033). The written judgment signed on March 12, 1999, by Judge Entz does not conform to the plea bargain agreement signed by Appellant on March 11th. Among other material discrepancies is the court's enhancement of punishment. The judgment states that Appellant's punishment is *assessed . . . at a fine of*

$300.00 and 1 (one) year confinement in the Dallas County jail (CR 034; emphasis added).

Judge Dohoney had presided during the trial, but on March 11th he did not sign a judgment. A written judgment, recorded in volume 404, page 23, of the court records, was not signed until March 12, 1999, and it bears the signature of Hon. Harold Entz (CR 034), who had not tried the case or engaged in the plea bargain proceedings. Furthermore, a document entitled, *Conditions of Community Supervision,* which is attached to and made part of the judgment, also was signed by Hon. Harold Entz, although he had recused himself from the case. Not only is the attachment signed by a recused jurist, it shows to have been signed by him on March 11, 1999, when he had not presided over the case, had not been in attendance at and had not participated in the plea bargain proceedings.

Appellant respectfully submits that the discrepancy in his motion filed on behalf of his client on June 14, 1996, for leave to file a mandamus proceeding makes him no more subject to a charge of perjury than discrepancies of record in the trial court at bar. Hon. Harold Entz's signature appears on an official document, which misrepresents the date upon which it was signed, and the signature, itself, is without authority, because Judge Entz had been recused and had not presided over trial of the case. Surely the impact of a recused judge, who had not presided over a trial, signing a final judgment in a criminal case could be far more harmful than Appellant's mischaracterization to this Honorable Court of a

document he had been led to believe had been signed by a trial judge. Appellant's efforts on behalf of a client were unrewarded and uncompensated. Because of the ineffectiveness of the document used before this court, it was useless and irrelevant. On the other hand, Judge Entz's impact on the validity and enforceability of the judgment in the case at bar can be far-reaching.

Lawyers and judges make innocent mistakes in courts all the time, and as in the case at bar the rules are versatile enough to accommodate innocent, unintentional mistakes. When lawyers and judges do err, however, they are not charged, indicted and subjected to criminal prosecution for aggravated perjury and stripped of their law licenses and livelihood, particularly when the error is traceable to an opposing counsel's failure to communicate.

Judge Entz had not tried the case. After he declared a mistrial and discharged the jury in the 1st trial, he recused himself from the case (CR 007). Before he recused himself, however, without prior notice to Appellant, he granted the State's motion to dismiss the indictment upon which the 1st trial had been based (CR 111). Then the State obtained a re-indictment of the same charge from another grand jury, without giving Appellant prior notice or an opportunity to appear before the 2nd grand jury (CR 002). The 2nd indictment also contains different terms from the 1st indictment.

As part of the appellate record at bar, Appellant requested the district clerk to include a copy of an order of the Judge of the 1st Administrative District appointing Judge Dohoney to replace Judge Entz as the trial judge (CR 75 [1st two items], items 3 [p & q] and items 4 [a & b], but Appellant was told that such an order could not be found, and therefore, as far as the trial record is concerned, there is no Administrative Judge's order appointing Judge Dohoney, as required by Rule 18a(c), *Texas Rules of Civil Procedure*.

C. Post-Judgment Proceedings

After a judgment was signed on March 12, 1999, and he had bowed to his criminal counsel's urgent recommendation to enter into a plea bargain, Appellant recognized the enormity and devastating consequences of his act, and he filed a motion to retract his plea bargain agreement (CR 038-041). Because of surprise and lack of time to prepare a defense, when mixed with stress and pressure to proceed with a jury under the circumstances, Appellant's plea truly had not been voluntary. Newly discovered evidence presented at the hearing of his motion for new trial overwhelmingly proved that testimony of the 11 year old child was false, contrived and fabricated by the Oklahoma paternal family.

Furthermore, Appellant had not been disciplined by the State Bar of Texas to have caused loss of his license to practice law. In fact, there is uncontradicted evidence in the

record that the State Bar found no grounds to discipline Appellant (CR 038-041).

Appellant's motion to withdraw his guilty plea was denied (CR 054). Appellant filed a motion for new trial (CR 049), supported by affidavits of the child's mother (CR 042-048) and Appellant's former legal assistant (CR 056-060) that directly contradict the child's fabrications. Additional, impartial, 3rd party evidence produced upon the new trial motion (*Motion or New Trial Hearing*, RR 5/24/99) affirmed the mother's and Appellant's secretary's affidavits. Appellant submits that the trial court committed reversible error in ruling that the 11 year old child's testimony was admissible. *Texas Rules of Evidence* Rule 404(b); see also, *Hines v. State*, 571 S.W.2d 322 (Tex.Crim.App. 1978); *Cameron v. State*, 530 S.W.2d 841 (Tex.Crim.App. 1975); *Alvarez v. State*, 511 S.W.2d 493 (Tex.Crim.App. 1974); *Haft v. State*, 416 S.W.2d 824 (Tex.Crim.App. 1967). The trial court committed reversible error in denying Appellant's new trial motion.

The following random excerpts of witnesses' testimony at Appellant's *Motion for New Trial Hearing*, show the deceptive and contrived nature of the evidence that the jury would have heard through the child.

Barry Coakley, Ph.D.:

1. Appointed by the trial court to do an evaluation of the child (RR 45, II. 6-8);
2. Found no proof of sexual abuse (RR 71, II. 5-9);

3. Child never said anything about Appellant asking her to lie or offering her money to lie (RR 71, II. 10-14, 22-25; 72, II. 2, 11-25, 73, 74, II. 17-21).

Justin Ezchoa

1. Employed by Dallas County Court Services to conduct social studies of families engaged in custody disputes (RR 107, II. 16-19));
2. Talked with the child, K.C. (RR 108, II. 9 -11);
3. The child never mentioned being offered money by Appellant or playing games in Appellant's office with chairs, to get her to testify in a particular way (RR 109, II. 1-14);
4. Ezcoha concluded that the child's report of sexual abuse was untrue (RR 109, I. 25; 110, II. 1-2);
5. The child's stories were conflicting (RR 110, II. 1-2);

Carol Ann Wilson

1. An attorney specializing in Family Law (RR 66, I. 10), who had assisted Appellant in the custody case;
2. Never met with the child in Appellant's office (RR 80, II. 19-23);
3. Never witnessed an offer by Appellant to pay K.C. $20 to testify in a certain way (RR 80, II. 24-25; 81, II. 1-5) nor witnessed Appellant and

K.C. playing with chairs in Appellant's office (RR 81, II. 7-11) nor witnessed Appellant ask K.C. to sign a paper (RR 81, II. 12-15).

Paula Marie Crank

1. The child's mother (RR 92, II. 24-25; 93, II. 1-2);
2. The child was in Appellant's office only 1 time (RR 94, II. 11-13);
3. The child was never out of mother's presence while in Appellant's office (RR 95, II. 4-6);
4. Appellant never offered money to the child to testify (RR 95, II. 7-10);
5. No role playing with chairs ever took place with the child in Appellant's office (RR 95, II. 11-13);
6. Appellant never asked the child to sign a piece of paper (RR 95, II. 14-16);
7. After her father's death and the child started visiting the paternal family in Oklahoma, she changed drastically in school and personal appearance (RR 96, II. 9-24);
8. After the child started visiting with her paternal family in Oklahoma, she began to lie about things (RR 98, II. 1-25; 99, II. 1-9). (See also testimony of her public school teachers, Peggy Joyce Williams and Cynthia Forbes. (RR 49-60).

Paul R. Shunatona

1. Practicing attorney (RR 114, II. 9-22);
2. Represents Katherine Crank, the paternal grandmother (RR 114, II. 15-20);
3. Represents Katherine crank, the paternal grandmother (RR 114, II. 15-20);
4. Admitted under oath that *there was no finding of sexual abuse in any court, not even in tribal court* (RR 118, II. 6-11);
5. Admitted that he does not *know of any physical evidence that has come into [his] possession that would indicate that Katrina Crank was sexually abused* (RR 119, II. 18-21);
6. Admitted that in tribal court Shunatona had testified that sexual abuse had never been proven (RR 119, II. 22-25).

After an *en camera* inspection of Texas Department of Protective and Regulatory Services records, **the trial court** also stated that as late as September 30, 1996, there is no evidence that sexual abuse had occurred (RR 105, II. 18-25; 106, II. 1-4).

The trial court denied Appellant's motion for new trial, and Appellant filed a motion for leave to appeal (CR 063-066), which was granted *as to those matters that have been filed in writing before the time of the plea* (RR, *Motion for New Trial Hearing*, 123, II. 24-25; 124, II. 1-2). Thereafter Appellant gave timely notice of appeal (CR 068).

D. Plea Bargain Agreement and Judgment

Must Be Compatible

Rule 25.02, *Tex.R.App.P.*, provides that a criminal defendant's right of appeal is limited if judgment is *rendered on [a] plea of guilty . . . [if] the punishment assessed did not exceed the punishment . . . agreed to by the defendant* (emphasis added). Art. 44.02, *C.C.P.*, contains identical language. The legislature appears to confirm that an agreement is synonymous with the word, *contract*, and if it is breached by the State or the court, which is required to approve it, the defendant's door to an appeal, not limited to jurisdictional or structural errors, is opened. Since punishment invoked in the judgment in the case at bar exceeds that to which Appellant agreed in writing, his plea bargain agreement is no bar to an appeal. On the contrary, breach of the plea bargain agreement is material and an independent ground for reversal of the trial court judgment. *Ervin v. State*, 1999 WL 10277 (Tex.Crim.App. 1999).

Without regard to Appellant's appellate rights arising out of breach of the plea bargain agreement, *Helms v. State*, 484 S.W.2d 924, 927 (Tex. Cr. App. 1972) has been overruled. In an opinion delivered on January 5, 2000, by the Texas Court of Criminal Appeals in *Young v. State*, all question of a defendant's appellate limitations have been resolved, and now he is permitted unlimited appeal, since it has followed a guilty plea given under a plea bargain agreement. Appellant respectfully submits that his guilty plea under a plea bargain is not a waiver of any rights on appeal and that he is not barred from raising all issues he might have raised had there been no guilty plea and plea bargain agreement.

There are additional, independent reasons to ignore Rule 25.029(b)(3), *Tex.R.Civ.P.* , and Art. 44.02, *C.C.P.*, and reverse the trial court judgment. The judgment at bar is signed by a judge who had recused himself and who had not presided over any of the trial proceedings. Rule 18a(c), *Tex.R.Civ.P.*, provides that *[i]f the judge recuses himself, he shall enter an order of recusal and request the presiding judge of the administrative judicial district to assign another judge to sit, and shall make no further orders and shall take no further action in the case except for good cause shown in the order in which such action is taken.*

Judge Entz recused himself after the 1st trial of Appellant's case, but he did not enter an order of recusal or request the presiding judge of the 1st Administrative District to replace him. Without apparent power or authority, he appointed Hon. Robert G. Dohoney, Retired, to preside over the 2nd trial (CR 007). Judge Dohoney was not an elected judge nor was he the sitting judge of another district court, and there is nothing in the record which reports an order of the 1st Administrative Judicial District appointing him to try the instant case (CR 074-076).

Judge Dohoney had no jurisdiction to preside at a trial of Appellant's case, because he was not duly and properly appointed according to the constitution and laws of the State of Texas, and all of his actions and rulings were void and a nullity. Judge Entz's signature on the final judgment voids that instrument, *ab initio*. The error is compounded because of

his recusal and failure to preside over trial. *Sharkey v. State*, 994 S.W.2d 417 (Tex.App. Texarkana 1999, no pet.); *Eubanks v. State*, 1999 WL 976163 (Tex.App. Texarkana 1999, no pet.); *Fry v. Tucker*, 202 S.W.2d 218, 221 (Tex. 1947); *Buckholts ISD, et al. V. Glaser*, 632 S.W.2d 146, 148 (Tex. 1982). An order of a constitutionally disqualified judge is "absolutely void," "a nullity." *Templeton v. Giddings*, 12 S.W. 851 (Tex. 1889); *Stephenson v. Kirkhyam*, 297 S.W. 265, 267 (Tex.Civ.App. San Antonio 1927, no writ).

In light of the *Young v. State, supra*, Appellant assumes that it was unnecessary for him to obtain the trial court's permission to appeal. However, Appellant respectfully submits that the statutory provision requiring a defendant to obtain a judge's permission to appeal is unconstitutional, because there are no definable, statutory guidelines to assist a judge in a decision. A judge is free to act subjectively, arbitrarily and capriciously in a grant or denial of permission to appeal. See *City of Mesquite v. Alladin's Castle, Inc.*, 455 U.S. 283, 290, 102 S.Ct. 1070, 1074, 71 L.Ed. 152 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, for the proposition that we '*are a government of laws, and not of men*')

Conclusion of 1st Issue

Appellant respectfully submits:

1. Although he pled guilty, he did so under a plea bargain agreement, and under the holding of *Young v. State, supra*, that he be granted the right to appeal any

issues he might have raised had he not entered a guilty plea, without regard to whether or not they are jurisdictional or structural;

2. The judgment should be reversed and the indictment quashed, because (a) Hon. Robert Dohney did not have jurisdiction to conduct a trial; (b) punishment contained in the judgment exceeds the punishment to which Appellant agreed; (c) it was signed by Hon. Harold Entz, who had recused himself and had not presided at trial.

2nd Issue or Point Presented for Review
(Restated)

This appeal charges jurisdictional and structural defects, the substance of which were raised by written pretrial and trial motions, which questioned probability of cause for the indictment, constitutionality of §37.03 and §37.04, *Texas Penal Code*, because under the holding of *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), the sections violate Appellant's 5th , 6th, and 14th Amendment rights to due process and jury trial.

3rd Issue or Point Presented for Review
(Restated)

The 2nd trial of Appellant's charges of aggravated perjury subjected him to double jeopardy, when the court in

the 1st trial had instructed the jury that the acts charged against Appellant in the indictment were material, thereby causing a deadlocked jury which the court discharged without "manifest necessity."

4th Issue or Point Presented for Review
(Restated)

There was no probable cause for Appellant's indictment, which should have been quashed or dismissed upon Appellant's several pretrial and trial motions.

Statement and Argument
of 2nd, 3rd and 4th Points

The indictment charges (CR 002) that in a document entitled *VERIFICATION (sic)* Appellant made a false statement under oath and swore to the truth of a false statement previously made with intent to deceive and with knowledge of the statement's meaning. It further charges that the *document was attached to and incorporated in a MOTION FOR LEAVE TO FILE A PETITION FOR WRIT OF MANDAMUS AND PETITION OF PROHIBITION WITH LEGAL AUTHORITIES* (sic). The indictment then defines the false statement as follows: *to wit, that the allegations of fact contained in these proceedings are true and correct.* **The indictment does not define the phrase, allegations of fact** nor the phrase, **these proceedings** (CR 002). Presumably it charges that the

allegations of fact in these proceedings are not true and correct, but the State offered no proof of such charges.

The text of the indictment switches, completely (CR 002) from the "document" it refers to as a *verification* to the *"said motion"* which presumably means the motion for leave to file a petition for writ of mandamus. In a *non sequitur* it charges that Appellant's argument that the mischaracterized "order" *does not specifically instruct peace officers of their duty in the event they take the children into possession,* is a false fact. The quoted phrase, which obviously is Appellant's interpretation of the mischaracterized order, does not appear in the *VERIFICATION (supra).*

The other false "statement" with which Appellant is charged with having made under oath, *with knowledge of its meaning and with intent to deceive* is in **said order.** However, *said order* does not appear in the verification, either. Thus, it the State had the burden to prove that the verification is false as to *said order,* which undoubtedly refers to the document Appellant mistakenly submitted to the court as the 301st District Court order of June 7, 1996.

The indictment chargesthat Appellant represented that *said order reads: "deliver the children safely [to this Court during regular court orders* (sic) *[Katrina Crank instanter]."* Appellant respectfully submits that the quote is true, not false. Appellant was referring to the document he was using in the appellate proceeding. It could only have been that "order,"

but an order not entered of record (and there was no order of record before the court", one only attached to an appellant's brief may not be considered. *Banowsky v. State Farm Ins. Co.*, 876 S.W.2d 509 (Tex.App. Amarillo 1994, no writ). Upon reflection, Appellant has concluded that the reason his application for leave to file a mandamus proceeding was his failure to attach a certified copy of an order to his pleadings.

The indictment is completely silent as to the terms of and does not even refer to an actual order signed on June 7, 1996, by the 301st District Court. Significant also is the indictment's failure to disclose that the *VERIFICATION* was Exhibit "U," one of a number of exhibits submitted to the appellate court in an *Appendix of Exhibits*. Appellant had fully disclosed to this Honorable Court that the documents in the *Appendix of Exhibits* were true only upon information and belief (*SEV.* Ex. "U"). So this Honorable Court is not misled by the State's selective, convoluted interpretation of the oath signed by Appellant, he quotes it in full (*SEV.* P. 9):

VERIFICATION

STATE OF TEXAS §
COUNTY OF DALLAS §

Before me, the undersigned authority, on this day personally appeared Jay S. Fichtner, who, being first by me duly sworn, upon oath deposes and says that he is the attorney for Paula M. Crank,

Relator; that he has authority to make this affidavit for and in her behalf; that the exhibits attached to this motion and contained in the "Appendix of Exhibits" which are attached and incorporated in these proceedings are true and correct to the best information and belief of affiant; that the allegations of fact contained in these proceedings are true and correct (Emphasis added).

/s/ Jay S. Fichtner

STATE OF TEXAS §
COUNTY OF DALLAS §

SUBSCRIBED AND SWORN TO before me, a Notary Public in and for the State of Texas, on this 14th day of June, 1996, to certify which witness my hand and official seal.

/s/ Anita H. Martinsen
Notary Public, State of Texas

The exhibits in the *Appendix of Exhibits* were only verified upon information and belief. Because the motion for leave to file mandamus proceeding was denied, under appellate court's rules and procedures then applicable, the *Appendix of Exhibits* was not filed (*SEV*, appellate docket sheet, [3 un-numbered pages in the copy provided to Appellant by the court reporter]).

Appellant filed a number of motions before trial to obtain dismissal of the indictment, but they were denied: *Motion to Dismiss Indictment as being Unconstitutional* (CR 023-028); *Defendant's Motion to Set Aside Indictment* (CR 085-087); *Addendum to Motions to Dismiss Indictments* (CR 108-110); *Motion to Dismiss Indictment Because of Double Jeopardy and Lack of Materiality* (CR Supp. #2 @ 34-35); *Motion to Determine Materiality and to Quash or Dismiss Indictment* (CR Supp. #2 @ 36-38).

There is no evidence of a *statement previously made* or that a *statement previously made* was false, as charged in the indictment. The State has the burden of proving beyond a reasonable doubt each of the elements of a crime.

It is a fundamental principle of law that a conditional verification or affidavit will not support a charge of perjury. *Graham v. McCarty*, 69 Tex. 323, 7 S.W. 342; *Burke v. Satterfield*, 525 S.W.2d 950, 955 (Tex. 1975). *Unless authorized by statute, an affidavit is insufficient unless the allegations therein are direct and unequivocal and perjury can be assigned upon it* (P. 954). See also, *Davis v. California Shoes, Inc.*, 612 S.W.2d 703, 704 (Tex.Civ.App. Dallas 1981, no writ).

Furthermore, acting as an attorney on behalf of his client, Appellant's statements about the mistaken order either were true as a repetition of its language or it was Appellant's legal interpretation of the meaning and impact of the language. The facts in *Schoenfeld v. State*, 56 Tex. Crim. 103,

119 S.W. 101, are similar in many respects to the facts at bar, because the opinion involves interpretation of a written document. The court held (p.108), *We think the rule is well settled and correctly settled that . . . where the statement which is the basis of the accusation is a matter of construction, or a deduction from given facts, the fact that it is erroneous, or is not a correct construction, or is not a logical deduction from all the facts cannot constitute it perjury or false swearing . . . Thus a misconception or mistake in swearing to the construction of a written instrument is not sufficient to warrant a conviction of perjury . . . perjury cannot be committed in testimony to the legal construction of a written instrument.* See also, *State v. Eversole,* 889 S.W.2d 418 (Tex.App. Houston [14th dist.] 1995, review denied); *Brasher v. State,* 715 S.W.2d 827, 831 (Tex.App. Houston [14th dist.] 1986, no petition).

Many authorities have declared that an affidavit must be disregarded unless the content is direct and unequivocal and perjury can be assigned upon it. *Brownlee v. Brownlee,* 665 S.W.2d 111 (Tex. 1984); *Burke v. Satterfield,* 525 S.W.2d 950 (Tex. 1975); *Savage v. Herrin Transfer & Warehouse Co.,* 219 S.W.2d 101 (Tex.Civ.App. Galveston 1949, no writ); *Bledsoe v. Mack,* 57 S.W.2d 869 (Tex.Civ.App. Galveston 1933, no writ). In an early supreme court decision, which is as applicable today as it was in 1891, Chief Justice Slayton wrote, *the general statement under oath that "the allegations are true and correct to the best of his knowledge and belief" is too general to constitute compliance with the law . . . the affidavit should show, substantially,*

that the party making it has knowledge himself of the facts. Spinks v. Matthews, 80 Tex. 373, 374, 12 S.W. 1101.

The quoted phrase, *the allegations of fact contained in these proceedings are true and correct* clearly refers to the proceedings before the court of appeals, but the indictment does not charge Appellant with a misstatement relating to the court of appeals proceedings. It only refers to events that allegedly had occurred in the trial court. The indictment does not charge that there was a factual error in the appellate court proceedings, and there is no evidence or insufficient evidence that Appellant made a factual misstatement about the proceedings before this Honorable Court. If the Appellant had done so, this court would have been the first to know, it could have taken actions to discipline Appellant, which it did not do.

Through pretrial motions, *supra,* Appellant brought to the attention of the trial court fundamental flaws in the indictment and sought to have it dismissed as a matter of law. The trial court denied all motions in which Appellant tried to persuade it that Appellant's verification upon information and belief will not support a charge of perjury; demonstrated that there is insufficient evidence that Appellant could have formed an intent to deceive, since the only evidence is that Shunatona had possession of the original, signed copy of Judge O'Connell's June 7, 1996, order (RR 3/10/99, 6 II. 2-5 [*I signed the order and gave it to Paul Shunatona*]; 7, II. 5-8; 7, II. 13-18; II. 10-11). Judge O'Donnell also testified that the order was

signed *past 4 or 5 o'clock . . . we were closing the courthouse* (RR 3/10/99, 6, II. 20-22). It must be remembered that the trial court out of which this appeal is made had the benefit of Shunatona's and Judge O'Donnell's sworn testimony in the 1st trial.

The motions argued that there is insufficient evidence beyond a reasonable doubt that Appellant's verification or the document Appellant believed to have been a trial court order could have affected the outcome of the appellate proceedings or trial proceedings. The motions also argued that the trial court's instruction on materiality in the 1st trial as a matter of law violated Appellant's 5th, 6th and 14th Amendment rights to due process and trial by jury of the material elements of aggravated perjury and had caused Appellant twice to be put in jeopardy of punishment for the same offense. The trial court erred in failing to dismiss or quash the indictment.

Without regard to evidence or lack thereof, the trial court erred in failing to dismiss or quash the indictment because it is founded upon an unconstitutional statute. Appellant was charged with aggravated perjury under §37.03 and §37.04, *Texas Penal Code*. The statute legislates that the issue of materiality, which is an essential element of the offense, be determined by the court as a matter of law, not a jury. In reliance upon the language of the statute, one or more of Appellant's motions asked the court to conduct a pretrial hearing to determine materiality, which the court refused to do.

However, in the 1st trial in 1997, the court instructed the jury on materiality as a matter of law, which Appellant submits led to a hung jury. The instructions was materially erroneous. It did not follow the mandate of Sec. 37.04(a) and did not ask the jury to return a verdict based upon the acts charged in the indictment, which if most liberally interpreted related only to the verification of the "order" Appellant used in his motion for leave to file a mandamus proceeding. However, the trial court submitted the entire packet of documents to the jury for consideration: *the document entitled 'Motion for leave to File a Petition for Writ of Mandamus and Petition for Writ of Prohibition with Legal Authorities' as a matter of law was of such a nature and content that it had a direct and immediate connection with a material fact or facts as to give weight tot he sworn content of the document presented to members of the 5th District Court of Appeals . . . Close of court finding with regard to this particular issue* (CR 142, II. 8-18). The instruction is facially erroneous if for no other reason than it fails to use the definition of materiality contained in the statute.

An indictment should be dismissed or quashed for lack of probable cause, when there is a substantive defect. *State v. Salinas*, 1996 WI, 477008 (Tex.App. Houston 1st dist., 1996; *State v. Eversole*, 889 S.W.2d 418 (Tex.App. Houston 14th dist. 1994, review refused). Among substantive defects inherent in the instant case is a legislatively mandated requirement of the aggravated perjury statute, §37.03 and §37.04, *Texas Penal Code*, that materiality be determined by the court as a *questions of law*. Acting in accordance with the code sections, Appellant

tried to obtain a pretrial hearing of materiality and tried to get the indictment dismissed or quashed. The trial court denied the motions, waited until the 1st jury trial was completed; announced that the Appellant's acts were material; and instructed the jury as a matter of law that the act was material (See pretrial motions, above; see, also, CR 139-151).

Appellant had relied upon the plain wording of *Texas Penal Code* §37.03 and §37.04 and the 1st opinion in *State v. Rosenbaum*, 910 S.W.2d 934 (Tex.Crim.App. 1995). *Rosenbaum* does not dispel the principle that under Texas law *materiality* is an element of the crime to be determined by the trial court without intervention of a jury. It merely holds that in making its determination a court may await presentation of all the evidence. It does not speak to the constitutionality of§37.04, which continues to require that the essential element of materiality be determined by the court as a matter of law and thus precludes a jury from passing upon the issue.

The court in *Rosenbaum* should have been aware of the Supreme Court's decision in *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), because it was published in May or June 1995, whereas the *Rosenbaum* decision did not come down until December 1995, unless the parties did not bring the Supreme Court decision to the attention of the Texas Court of Criminal Appeals. If proper procedure had been followed, Appellant submits that the Texas Court of Criminal Appeals would have held the aggravated perjury statute unconstitutional.

In *United States v. Gaudin*, 515 U.S. 506, 115 Sup.Ct. 2310, 2314, 132 L.Ed.2d 444, Justice Scalia, speaking for the Supreme Court, announced that a defendant has a constitutional right under the 5th and 6th Amendments to the U. S. Constitution to have all elements of a crime submitted to a jury. *Materiality* is one of the elements of aggravated perjury, the crime for which Appellant was indicted and tried. Through the provisions of the 14th Amendment, the states are subject to the due process provisions of the 5th Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 159, 88 S.Ct. 1444, 1447, 20 L.Ed.2d 491 (1968); *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056 (1969); *U. S. Balsys*, 524 U.S. 666, 118 S.Ct. 2218 (1998).

The Supreme Court decision in *United States v. Gaudin*, holds that because materiality of a false statement is an essential element of the crime of perjury, it must be submitted to a jury. See also, *Waldron v. United States*, 516 U.S. 928, 116 S.Ct. 333, 133 L.Ed.2d 233 (1995).

Appellant had moved the trial court in the 1st trial to dismiss or quash the indictment on constitutional grounds, among others. (See pre-trial motions listed above). §37.03 and §37.04, *Texas Penal Code*, clearly are unconstitutional, because they contradict and are in direct conflict with the *Gaudin* opinion and the 5th, 6th and 14th Amendments to the U. S. Constitution, and the trial court committed reversible error in failing to dismiss the indictment.

To Appellant's knowledge no court of appeals or the Texas Court of Criminal Appeals has yet to directly address the impact upon §37.03 and §37.04 of the decision in *Gaudin*. However obedience by all courts to the 5th, 6th and 14th Amendments to the U. S. Constitution being required, Appellant respectfully submits that until the legislature modifies the sections, they are unenforceable. As a mater of fact, the opinion in *Bonilla v. State*, 933 S.W.2d 538, 543 (Tex.App. Houston [1st dist.] 1996, no pet.) noted, *We agree with appellant that Gaudin implicates the constitutionality of section 37.04(c) of the Texas Penal code*, but because the defensive issue had been *raised for the time in his motion for rehearing and [i] in his points of error, appellant challenged only the sufficiency of the evidence* (p. 544), the court declined to review the issue. In a concurring opinion Justice Cohen wrote (p. 544): *I agree with appellant that Texas Penal Code Ann. §37.04(c) (Vernon 1994) is unconstitutional for the reasons stated in United States v. Gaudin.*

Appellant's right to protection from double jeopardy was violated when the court in the 1st trial dismissed the jury. There was not a manifest necessity to discharge the jury. It allowed the State, without prior notice to Appellant, to obtain an amended indictment from another grand jury. The State had failed to introduce sufficient evidence of Appellant's intent to deceive or that his verification would support a charge of perjury. Further, the court's charge to the jury on materiality was fatally defective.

It is long established that jeopardy may attach in a trial that ends inconclusively or without a verdict. *Crist v. Bretz*, 437 U.S. 28, 33, 98 S.Ct. 2156, 2159 (1978); see also, *Arizona v. Washington*, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978). The Federal rule that jeopardy attaches when a jury is impaneled and sworn is applicable to the states by the 14th Amendment. Discharge of the jury and dismissal of the first case allowed the State to continue harassing Appelant by obtaining another defective indictment, under the same facts, under the same statute, without probable cause.

Conclusion of 2nd, 3rd and 4th Points

Appellant's mistaken use of a document he believed was an order signed by a trial court cannot support perjury, because Appellant never made an unqualified representation to the appellate court that the document was a true and correct copy of a trial court order and it was not certified by the district clerk. Appellant's discussion of the terms of the document was not a statement of fact but in the nature of legal interpretation or argument, which will not support a charge of perjury.

Without regard to the foregoing, and without waiver, Appellant submits that the Texas aggravated perjury statute is unconstitutional, void and unenforceable and a 2nd trial of Appellant on aggravated perjury charges after the trial court's erroneous jury instruction in the 1st trial subjected Appellant to double jeopardy in violation of the 5th and 14th Amendments

to the U. S. Constitution. For all of the foregoing reasons, the indictment should have been quashed or dismissed.

5th Issue or Point Present
for Review
(Restated)

There is no evidence or insufficient evidence (1) that either Appellant's acts charged in the indictment were false or actionable; (2) that Appellant intended to deceive the court of appeals when he verified two statements charged in the indictment; or (3) that either of the two statements charged in the indictment was material to or could have affected the course or outcome of the appellate proceedings.

Statement and Argument of 5th Point

Appellant adopts and incorporates statements and arguments made in previous issues and points in this brief.

§2.01, *Texas Penal Code,* provides:

All persons are presumed to be innocent and no person may be convicted of an offense unless ***each element*** *of the offense is proved beyond a reasonable doubt. The fact that he has been . . . indicted for . . . the offense gives rise to no inference of guilt at his trial* (emphasis added).

Art. 38.03, *Texas Code of Criminal Procedure,* prescribes:

The defendant in a criminal case is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt, and in case of reasonable doubt as to his guilt, he is entitled to be acquitted.

Art. 1.15, *Texas Code of Criminal Procedure*, mandates that in cases where the defendant elects to plead guilty to a criminal offense, . . . *it shall,* (however) *be necessary for the state to introduce evidence into the record showing the guilt of the defendant and said evidence shall be accepted by the court as the basis for its judgment. In no event shall a person charged be convicted upon his* (guilty) *plea without sufficient evidence to support the same.*

If there is no evidence or insufficient evidence to support an essential element of a crime, fundamental error exists, and the court may review the error in the interest of justice. *Carter v. State*, 565 S.W.2d 468 (Tex.Crim.App. 1983). To determine whether evidence is factually sufficient, an appellate court must consider all the evidence *without the prism of 'in the light most favorable to the prosecution,' and it sets aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Clewis v. State*, 922 S.W.2d 126 (Tex.Crim.App. 1996), quoting from *Stone v. State*, 823 S.W.2d 375, 381 (Pet. Ref'd). An appellate court shall consider the legal sufficiency on constitutional grounds, as well as the factual sufficiency of the evidence. *Clewis, supra.*)

Although a defendant does not have the burden of showing "lack of evidence" to prevail upon grounds that the evidence was insufficient, Appellant submits at bar that there is such a dearth of credible, probative evidence of Appellant's knowledge of hand-written changes made by the 301st court to the proposed order given to him by opposing counsel that it is tantamount to no evidence. There is no evidence or insufficient evidence that Appellant had knowledge that the document that had been handed to him by the opposing lawyer did not conform to the original. Without knowledge, he could not have formed the requisite intent to mislead or deceive. Another way of phrasing it is to say that **Appellant truly did not know the meaning** of the document he mistakenly submitted to the court, and there is no evidence or insufficient evidence that he knew the document he was using had a meaning different form the original. The State had the burden of presenting evidence beyond a reasonable doubt that Appellant knew or understood the meaning of the document he was using. It failed to do so.

Appellant thought that it was an order of the 301st court which meant that it was unenforceable because of contradictions and understood that if he could convince this court that the submitted document was unenforceable, it would instruct the judge of the 301st Court to refrain from enforcing the presented "order." As is now known, Appellant's understanding of the document was incorrect, and even had he been successful before this Honorable Court, an order to the trial court would have been meaningless.

There is no evidence or insufficient evidence that on June 14, 1996, when he filed the mandamus proceeding issue, Appellant was anything other than ignorant of the content and meaning of the order signed on June 7, 1996.

Under oath Paul R. Shunatona, Appellant's opposing counsel, admitted that he had prepared a draft of an order to submit to the 301st Court on June 7, 1996. At the court's discretion he handed a copy of the draft to Appellant. As he engaged the judge at the bench to obtain his signature, Appellant gathered his papers and left the courtroom. Changes were made to the draft at the bench by the judge in his own handwriting, who then returned the original, only copy of the signed order to Shunatona. It was late on a Friday afternoon. The beginning of a weekend, the afternoon of June 7, 1996. Appellant was not at the bench at any time. There is no evidence that the signed order reached the clerk of the court before June 14, 1996. The only evidence is that Shunatona is the last person to have had possession of the order bearing Judge O'Donnell's original signature on June 7, 1996.

Shunatona admitted under oath that he had not provided Appellant with a conformed copy of the June 7th order and **at no time** did Shunatona otherwise communicate with Appellant relating to the order. Judge O'Donnell, who appeared as a witness on Appellant's behalf, testified that after he had rendered his order, it was not read aloud in court (RR 3/10/99, 45 II. 11-22).

The State failed to present evidence of the chain of possession of the order. Other than Judge O'Donnell's testimony that after he signed it, he handed it back to Shunatona, there is no evidence that before June 14, 1996, it was delivered to the clerk of the 301st Court or any other court official. There is no evidence of when or by whom the order was enrolled in the records of the 301st Court or the process or length of time it took to enroll it. **There is no probative evidence that between June 7, 1996 and June 14, 1996, the signed order would even have been available to Appellant, if he had wanted to compare it with the copy handed to him by Shunatona before the judge signed the original.**

Furthermore, there is no evidence or insufficient evidence, direct or circumstantial, of the extent to which the mistaken "order" was material to this court. A statement is *material* for purposes of §37.04, *Texas Penal Code*, if it *could have affected the course or outcome of the official proceeding*. For a statement to be material, it *must be related to the decision making process of the proceeding* [and must have] *a substantial potential for obstructing justice*. *Mitchell v. State*, 608 S.W.2d 228 (Tex.Crim.App. 1980). This court's record of cause No. 05-96-00890-CV shows that Appellant's motion for leave to file a petition for writ of mandamus was denied on June 14, 1996, the same day it was filed (*SEV*, docket sheet [3 pages] and that an order was signed by Justice Deborah G. Hankinson without opinion or comment (*SEV*, Order).

The State did not call as a witness any member or legal assistant of the 5th District Court of Appeals. There is not a shred of probative evidence from the appellate court that Appellant's information and belief representations were material.

Conclusion of 5th Point

There is insufficient credible, probative evidence that Appellant knew the meaning of the document he used as a trial court order; that he intended to deceive this Honorable Court; that his verification or presentation of a document as a trial court order was material. There is no evidence that between June 7, 1996, and June 14, 1996, a copy or the terms of the order, as signed by Hon. Bob O'Donnell, were communicated to Appellant.

6th Issue or Point
Presented for Review
(Restated)

Appellant Motion for New Trial should have been granted because of newly discovered evidence, perjured, tainted or unreliable testimony of an 11 year old child, lack of a voluntary guilty plea, breach of the plea bargain agreement, Appellant's retraction of his plea bargain agreement and in the interest of justice.

Statement and Argument

of 6th Point

Appellant adopts and incorporates statements and arguments made under previous issues or points.

The standard of review of a trial court's judgment relating to a motion for new trial is abuse of discretion. *State v. Gonzalez*, 855 S.W.2d 692 (Tex.Crim.App. 1993). Art. 40.001, *Code of Criminal Procedure*, provides that a new trial shall be granted where material evidence favorable to an accused has been discovered since trial.

The Texas Court of Criminal Appeals opinion in *State v. Gonzales* cites the opinion of this Honorable Court in the same case for the proposition that a trial court has discretion to grant a new trial in the interest of justice (694):

> *. . . the Court of appeals* [5th District] *held Rule 30(b)* [Texas Rules of Appellate Procedure] *did not provide an exclusive list for the granting of a motion for new trial . . . The Court of Appeals, citing Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 918 (Tex. 1985) and Champion Int'l Corp. v. Twelfth Court of Appeals, 762 S.W.2d 898, 899 (1988) concluded that a trial judge may, in his discretion, grant a new trial in the interest of justice . . . For more than one hundred and twenty years, our trial judges have had the discretion to grant new trial in the interest of justice . . .* [it] *is*

> *almost the only protection to the citizen against illegal or oppressive verdicts of prejudice, careless or ignorant juries, and we think that the District Court should never hesitate to use that discretion whenever the ends of justice have not been attained by those verdicts.*

Material evidence set forth in foregoing issues in this brief demonstrate that the trial court abused its discretion in failing to grant Appellant's motion for new trial. This Honorable Court and the Texas Court of Criminal Appeals approved a trial court's grant of a motion for new trial under facts and circumstances much less compelling than those that exist at bar. Appellant's motion for new trial is extensive in its content and scope, and many witnesses and evidence were produced at the new trial hearing, as opposed to only one in *Gonzalez*.

The party that complains of abuse of discretion has the burden to bring forth a record showing such abuse. Simon v. York Crane & Rigging Co., Inc., 739 S.W.2d 793, 795 (Tex. 1987). Appellant respectfully submits that he has met the burden. The record at bar is replete with error that warrants a new trial. In the interests of justice the trial court's decision to deny a new trial should be reversed.

Conclusion of 6th Point

The trial court abused its discretion in failing to grant Appellant's motion for new trial, if not for the great number of errors in the record, because Appellant has suffered great harm. He has lost his right to practice law in the State of Texas and the livelihood he has known since 1955. There is insufficient evidence that Appellant was aware of the meaning of the document presented on appeal as a trial court order; there is insufficient evidence that his presentation of the document as charged was false; there is insufficient evidence of intent to deceive; and all the evidence supports the proposition that there was not an unqualified swearing, but only as to information an belief.

There is no specific list of errors required to support grant of a motion for new trial, and the trial court should have granted a new trial in the interests of justice, if for no other reason.

CONCLUSION

Appellant, who was ignorant of the true content of an order signed by the 301st District Court on June 7, 1996, foolishly believed that ethics of the legal profession would have required opposing counsel to inform him that the court order, as signed, was different from the copy Appellant had received. Actually, Shunatona did not even have to educate Appellant. All he had to do was to send a copy of the signed order to Appellant, but he intentionally suppressed the changes made to his draft by Judge O'Donnell, and there is no

way of telling from the evidence he held the original order. Appellant does not know to this very day.

Appellant has not been able to determine the forces that have motivated prosecution of this convoluted case by the District Attorney of a fellow lawyer. There is no evidence that the appellant enjoyed financial or other gain from his action on behalf of a poor client to retain her two children. A great injustice was done when Appellant was forced to plead guilty to a crime of which he is innocent, and to have lost his license to practice law, was akin to a death knell for one who had done nothing but follow the legal profession for his entire working life. Embarrassment, shame and frustration are only part of the pain, loss and heartbreak suffered by Appellant and his family. Through this appeal, Appellant hopes to obtain some vindication and reinstatement of his lawful place in the legal community.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellant prays that the judgment of the trial court be reversed; that all charges be dismissed or quashed; in the alternative, that this case be remanded for a new trial. Appellant further prays for such special and general, legal and equitable relief to which he is entitled under the law.

/s/

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Certificate of Service

This is to certify that on the 7th day of February, 2000, a copy of the foregoing was served upon the Criminal District Attorney of Dallas County, Texas, buy depositing it postage prepaid in the U. S. Postal Service, addressed to Hon. Bill Hill, Frank Crowley Criminal Courts Building, 133 Harry Hines Blvd., Dallas, Texas 75207.

/s/
Jay S. Fichtner

Appendix No. 10

NO. 05-99-01053

IN THE COURT OF APPEALS
FIFTH DISTRICT OF TEXAS AT DALLAS

JAY SHELDON FICHTNER

VS.

THE STATE OF TEXAS

ON APPEAL FROM THE 194TH JUDICIAL DISTRICT
COURT OF DALLAS COUNTY, TEXAS
TRIAL CAUSE NO. F-97-03659-KM

APPELLANT'S ORIGINAL MOTION FOR
REHEARING AND REHEARING EN BANC

TO THE HONORABLE COURT OF APPEALS:

Appellant files this original motion for reconsideration of the court's opinion and judgment of April 5, 2001, and moves that the rehearing and reconsideration be by the court, *en banc*. Appellant also moves for oral argument of this motion.

The court's opinion contains material, harmful, reversible error as follows:

(A) The court's judgment violates the *Open Courts* provision of the Texas Constitution, Art. 1, §§13[13] and 19, Appellant's right to due course of law under the Texas Constitution, and Appellant's right to due process of law under the 14th and 5th amendments to the U. S. Constitution.

I Having found by its order of September 21, 2000,[14] that the trial court judgment of March 12, 1999, was void, all of the proceedings relating to the void judgment that occurred on March 11th & 12th, 1999, are a nullity, of no force or effect.

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1. All courts shall be open, and every person for an injury done to him, in his lands, goods, person or reputation, shall have remedy by due course of law.

2. Clerk's Record (CR), Supp. #3, 10/6/2000.

I. As part of its rationale for denying Appellant's appeal, the court erroneously relies upon a record of the trial court hearing of March 11, 1999, the substance of which was supposed to have been memorialize in the March 12th void judgment. However, assuming *arguendo* that Judge Dohoney's judgment of September 29, 2000, is valid, it superceded the March 11th and 12th proceedings. The State did not request that the appeal be abated to permit entry of a new judgment, no authority for abatement is cited by this Honorable Court, and *most importantly. . .the. . .order is void. . .It is void from its inception. Ex parte Stanley*, 826 S.W.2d 772, 773 (Tex.App. Dallas 1992, no writ).[15] The March 12th order is void from its inception.

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3. It must be noted that in *Stanley* the Dallas court of appeals clearly indicated that proper procedure required that if the appeal had been abated in *Stanley*, it would have been *to permit the trial court to **hold a hearing** for the sole purpose of determining the correct volume and number. . .*(Emphasis added). In the case at bar the court did not follow a procedure it found acceptable in *Stanley*.

II. This court's order to Honorable Robert Dohoney, personally,[16] clearly required that a decree be signed, quickly, *ex parte*, without hearing. It did not allow a reasonable time to for notice, preparation, and a trial court hearing. This court denied Appellant's motions to obtain a trial court hearing in connection with the replacement order of the March 12th.[17] Appellant was denied the protections afforded by the *open courts* provisions[18] and was denied basic substantive and procedural rights to due process of law as guaranteed by the 14th Amendment of the U. S.

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4. *Accordingly, we ORDER Honorable Robert Dohoney to sign a judgment in conformity with the plea bargain approved by Judge Dohoney and the judgment pronounced in open court on March 11, 1999.*

5. CR, Supp. 4, 12/7/2000.

6. (1) Courts must actually be open and operating; (2) Citizens must have access to the courts, unimpeded by unreasonable financial barriers; (3) Our law must afford meaningful legal remedies to our citizens.

Constitution and Art. I, §19 of the Texas Constitution.[19]

2. The court erred in failing to reverse the trial court, because under the holding in *U. S. v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), §§37.03 and 37.04, *Texas Penal Code*, violate Appellant's 6th and 14th Amendment right to due process of law and a jury trial. Appellant was indicted and charged with crimes under an unconstitutional statute, which started off a chain of events. In numerous pre-trial motions Appellant sought to have the charges dismissed. Appellant has standing to challenge the statute, because in the 1st trial his 5th and 6th Amendment rights were violated when the trial court instructed the jury as a matter of law that Appellant's acts were "material." To avoid Appellant's constitutionality challenge and Appellant's standing to challenge, this court says Appellant has pleaded guilty to a misdemeanor. This begs the issue. Appellant never would have been in a position to plead to felony or included misdemeanor, had the original indictments been dismissed.

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7. *LeCrowy v. Hanlon*, 713 S.W.2d 335 (Tex. 1986); *Sax v. Votteler*, 648 S.W.2d 661 (Tex. 1983); *Nelson v. Krusen*, 678 S.W.2d 918 (Tex. 1984).

3. Whether charged with a misdemeanor or felony, Appellant's representation to this court of appeals in the application for writ of mandamus he presented does not give rise to a perjury charge. His representation to this court was that the order he presented as being a copy of that signed by the trial judge was correct **to his best information and belief**. Whether the statement was a "verification" or and "affidavit," it will not support a criminal charge of perjury, and Appellant cites many authorities in his brief in support of such proposition.

4. The court's holding that *[A] term of regular probation in the abstract, without reference to any sentence, does not exist in the law,* of itself, requires reversal and remand or reversal and rendition of the judgment below. The court concedes that the State and Appellant never presented an enforceable, written plea bargain agreement for approval by a trial court.

   A. To the contrary, this Honorable Court has chosen to find **as a fact** that *Appellant could* [not] *have agreed to a term of. . . probation. . . without any sentence* and *[W]e believe it clear from the record that all present at the plea hearing understood the sentence to be one year, suspended, and probated for one year. This is the only logical interpretation of the plea bargain agreement.* A court of appeals may not make fact

determinations. *State v. Smith*, 801 S.W.2d 629, 633 (Tex.App. Dallas 1991, pet. ref'd). Additionally, it ignores the fact that it not only was it Appellant, who agreed to the terms of the written bargain, the State agreed, as well.

5. Further, Appellant submits that the court's fact findings, rather than being supported by the record, are directly contrary to the record of the parties' discussions at the sentencing hearing.

6. The State has not complained about the plea bargain agreement. It has not sought to have it or the judgment reformed. Nor has it suggested that there is ambiguity in the document, which might allow parol evidence of the parties and open an argument that a court might determine the parties intent other than from the four corners of the document. Even parol evidence would require reversal of the judgment, because it would involve fact issues.

7. Further assuming, *arguendo, that* the court were to attempt to determine the parties' intent, it would have to recognize that the written plea bargain document is based upon a form of judgment drafted by the district attorney, and

therefore, would have to be construed most strictly against it.

E. That the parties never intended nor agreed to a term of sentence requiring jail time - much less its length - is further supported by the notation, "-0-" on the line on which a length of sentence might have been inserted as a condition of probation. That notation is deliberate. And as Appellant pointed out in his brief (p. 8), there is no "check mark" on the line which recites, *confinement in [State jail] [County jail]* (CR 033).

F. The *Plea of Guilty* hearing on 3/11/1999, not only does not support, but actually contradicts this Honorable Court's "clarity" statement that, *[W]e believe it clear from the record that all present at the plea hearing understood the sentence to be one year, suspended, and probated for one year.* (P 6, 4/5/01 op.) Appellant never agreed to serve 1 year in jail. And the prosecutor **never** recommended 1 year in jail! The only evidence in the record consists of discussion about 1 year probation and Appellant's forfeiture of a law license. Neither the prosecutor nor Appellant or his attorneys at any time discussed a sentence of 1 year in jail.

Witness the following relevant record excerpts (RR 3/11/99, *Plea of Guilty*) (Emphasis added):

The Court: *The range of punishment for the offense of perjury, as reduced by the State is by a fine not to exceed $4,000* ***or*** *by confinement in the county jail for a period* ***not to exceed*** *1 year* ***or*** *both fine and imprisonment.* (P. 4, ll. 5-11, Emphasis added).

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The Court: *The court would inquire if there has been a plea bargain and, if so, the terms of the plea bargain.* (P. 6, ll. 5-7).

Prosecutor: *The plea bargain is the State will dismiss the tampering with evidence indictment, reduce the aggravated perjury indictment to misdemeanor perjury in return for the defendant's voluntary resignation from the practice of law and surrender of his law license and bar card today, all of which is in lieu of discipline and for a minimum five-year period.* (P. 6, ll.8-16).

****

The Court: *Mr. Fichtner, is that your understanding of the plea bargain you and your lawyers have reached with the State?* (P. 6, ll. 22-24).

Defendant: *One year probation.* (P. 7, l. 2).

Prosecutor: *One year on the criminal conviction.* (P. 7, ll. 3-4).

The Court: *Is that your understanding of the plea bargain?* (P. 7, ll. 5-6).

Defendant: *Yes, Sir.* (P. 7, l. 9)

The Court: *. . .the court will accept the plea bargain agreement. . . And pursuant to the plea bargain. . .the court assesses punishment. . .*

Deft. Atty: *This is not part of the plea bargain, but. . .I really don't know what laudable goal it would be to have him supervised on this sort of probation.* (P. 7, l. 25, P. 8, ll. 1-6).

Prosecutor: *My position is that he needs to be supervised like any other probationer. . .* (P. 8, ll 8-9).

The Court: *Mr. Fichtner, you'll need to receive a copy of the court's order placing you on probation. After you receive that order, report to the probation department about any of the terms or conditions, ask your attorney. Court is recessed.* (P.11, ll. 14-19). Assuming, *arguendo,* that this Honorable Court has authority to made a fact determination, Appellant respectfully requests reference to those portions of the

record clearly show *that all present at the plea hearing understood the* [jail] *sentence to be one year.*

F. Appellant further submits that the cases cited by the court on page 6 of its opinion are inapposite to the issues at bar. The court seeks to justify its position by the statement, *If a plea bargain fails to address certain matters, the defendant has no right to demand performance of terms not appearing in the agreement or record.* Appellant does not demand and has not demanded performance of any terms that fail to appear in the written agreement or in the written record as reflected above. Appellant never has argued about the term of probation, but seeks a holding that the plea bargain agreement is a nullity, because it does not reflect a meeting of the minds of the parties; it is in fatal conflict with the court's judgment of September 29, 2000, because the punishment in the judgment exceeds that to which the State and Appellant agreed. Such judgment should be reversed and rendered or at the very least, reversed and remanded.

G. Under the record at bar, the court erred in holding that the trial court may set the terms of punishment, if they were not recommended by

the prosecutor and agreed to by Appellant, because by doing so the trial judge would violate the requirements of Art. 26.13, C.C.P., after declaring that he would impose a sentence in conformity with the plea bargain agreement.[20]

H. Before Appellant's plea, the court did not admonish Appellant that the range of punishment by the district attorney is not binding upon the court. Art. 26.13(a)(2), C.C.P.

I. Before Appellant's plea, the court did not admonish Appellant that it would follow the plea bargain agreement. Art. 26.13(a)(2), C.C.P.

J. Before Appellant's plea, the court did not admonish him that if punishment did not exceed that recommended by the prosecutor and agreed to by Appellant, before Appellant could appeal, the court would have to give permission, except as to those matters raised by written motion filed prior to trial. Art. 26.13(a)(2), C.C.P.

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8 See.p.7, ll. 10-19, Reporter's Record, *Plea of Guilty*, 3/11/99.

4. Appellant contends that Art. 26.13(a)(2), C.C.P. is only one of the bases of at least two separate points and arguments on appeal. It is part of the basis upon which Appellant contends that the judgment is void and a primary basis for his position that his appeal is not limited by his guilty plea. Appellant was not properly admonished by the trial court, and its sentence exceeded that to which the State and Appellant had agreed.

5. Not withstanding, Art. 26.13(a)(2), C.C.P., Appellant's points on appeal are not limited by his guilty plea under the holding of *Young v. State*, 8 S.W.3d 656 (Tex.Crim.App. 2000) and because of written motions filed prior to trial and ruled upon by the trial court.

6. There is no evidence in the record of Judge Robert Dohoney's right, authority or power to preside in Appellant's trial, except his alleged appointment by Judge Harold Entz, following his recusal. Appellant concedes that this Honorable Court may judicially know Judge Dohoney's status as a retired judge, but it may not find factually that he was assigned to another district court in Dallas or that he was a "visiting judge." *Smith, supra.* The State agrees that Judge Entz had recused himself. No motion was required of Appellant, because Judge Entz's recusal was voluntary. Judge Entz had no power or authority to appoint another judge. That power lay in the Administrative Judge of the 1st Administrative District. Thus, Judge Dohoney's jurisdiction was non-

existent *ab initio*. Without power or jurisdiction to act, fundamental error occurred, when this court ordered him to sign another judgment, and he followed such mandate.

7. This court erred in affirming the trial court's grant of the State's motion to allow the 11 year old child to testify and in denying Appellant's motion for new trial, because the totality of circumstances, as demonstrated in the record, show that the trial court abused its discretion. In Appellant's first trial the prosecutor did not call the child as a witness in chief or rebuttal, though her testimony would have been fresher and more timely. The child was permitting in the case at bar to testify to an alleged criminal act which had no relevancy to Appellant's alleged acts before this Honorable Court. There is no evidence that the child testified or had been called to testify in the ancillary case about which her testimony related. All of the evidence overwhelmingly shows that the reliability and credibility of the child was suspect. Witness after witness testified that there was no evidence that the child had been sexually abused by her half-brother, as she claimed. If abuse occurred at all, it was extremely remote. Even in the child's story it would have occurred years prior to Appellant's trial. Whatever minimal relevancy and materiality that it might conceivably have had in Appellant's case was far out-weighed by its improperly prejudicial effect.

Lack of credibility, relevancy and materiality of the child's testimony to the case at bar is probably best demonstrated by the fact that Appellant, had no knowledge that the reputed order that he had presented to this court in an application for writ of mandamus filed on behalf of the child's mother was not an order signed by the court in that case.

A. This Honorable Court observes that his defense to the criminal charges was mistake. It was one of Appellant's defenses, but it was based upon the uncontradicted record, confirmed by the testimony of the attorney who filed charges with the district attorney, that Appellant never had had a copy of the order signed by the trial judge. That same trial judge testified at Appellant's trial that he had instructed the attorney to provide Appellant with a copy of the order that he had signed. The attorney testified under oath that he had disobeyed the judge and had not sent the copy. Thus, Appellant did not have a signed copy.

B. For this court to speculate as to whether Appellant might have obtained a copy or how he might have obtained a copy again places it in a fact-finding mode, which is the province of the prosecuting attorney. There is not a shred of evidence in the trial record that Appellant had a copy of the order or even that the order

was in some way available to him. To the contrary, the only evidence is that the district clerk's clerical process would have prevented a copy of the order from being available for 5 days to a week.

6. This case presents issues of statute constitutionality, right to due process of law, applia tion of the *Open Courts* provision of the Texas Constitution, meaning and definition of "verification" or "affidavit," effect of a plea of guilty under a plea bargain agreement upon a defendant's appellate rights, in light of *Young v. State, supra,* meaning and enforceability of a written plea bargain agreement, meaning and interpretation of the term, "voluntary" in the context of a plea bargain, enforceability and application of Rule 18(a), *Tex.R.Civ.P.*, preservation of error after a hung jury, when a prosecutor obtains re-indictment for the same crime.

WHEREFORE, PREMISES CONSIDERED, Appellant prays that this motion for rehearing be considered by the court, *en banc,* and upon reconsideration that the judgment be reversed and rendered or reversed and remanded for a new trial.

Respectfully submitted,

/s/ Jay S. Fichtner
14901 Quorum Drive, Suite 740
Dallas, TX 75240

Tel.: 972-404-9991
Fax: 972-404-9994

CERTIFICATE OF SERVICE

On the 19th day of April, 2001, a copy of the foregoing pleading was delivered to the Dallas County District Attorney's office, Frank Crowley Courts Building, 133 North Industrial Blvd., Dallas, Texas 75207, by depositing it with the United States Postal Service, postage prepaid.

/s/ Jay S. Fichtner
Jay S. Fichtner

Appendix No. 11

Order issued May 22, 2001

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-99-01053-CR

JAY SHELDON FICHTNER, Appellant

V.

THE STATE OF TEXAS, Appellee

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ORDER

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Before Justices James, Wright, and Bridges

The appellant's Motion for Rehearing filed April 23, 2001, is **OVERRULED.**

/s/Tom James
Tom James
Justice

Appendix No. 12

FILED
October 30 1997
Bill Long
Dist. Clerk Dallas Co. Texas

NO F96-02328-UM

STATE OF TEXAS	§	IN THE DISTRICT
	§	COURT
VS.	§	194TH JUDICIAL
	§	DISTRICT
JAY SHELDON FICHTNER§		DALLAS COUNTY,
	§	TEXAS

DEFENDANT'S MOTION TO SET ASIDE THE INDICTMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Jay Sheldon Fichtner, defendant in the above-styled and numbered cause, and, prior to announcing ready, moves that the indictment filed in this case be set aside by virtue of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I §§ 10 and 19 of the Texas Constitution, and Articles 1.05, 21.01, 21.02, 21.03, 21.04, and 21.11 of the Texas Code of Criminal Procedure for the following reasons:

I.

The indictment does not state in plain and intelligible words the offense with which the Defendant is charged as required by Article 21.02, Code Criminal Procedure.

II.

The indictment does not state every element necessary under the statute upon which it relies as required by Article 21.03, Code of Criminal Procedure.

III.

The indictment does not set forth with the required certainty the allegations necessary to plead the judgment that may be given upon it in bar of another prosecution for the same offense by Article 21.04, Code of Criminal Procedure.

IV.

The indictment does not state the requisite intent necessary to be proved as required by Article 21.05, Code of Criminal Procedure, as applied through Article 21.23, Code of Criminal procedure.

V.

The indictment is vague, indefinite, ambiguous and uncertain and does not properly apprize the Defendant of the nature of the proof he is expected to meet on trial of this case, and the Indictment does not meet the requisites of Indictment as required in Article 21.02 of the Code of Criminal Procedure, as applied through Article 21.03, or the requisites of Article 21.21, nor the certainty required of indictments as required by Articles 21.02, 2103, 21.04, 21.05 and 21.11 of the code of Criminal Procedure in that the Indictment does not set forth in ordinary and concise language that degree of certainty that

will give the Defendant notice of the particular offenses with which he is charged and to enable the Court on conviction to pronounce the proper judgment. In this connection, it is shown that the allegations in the Indictment which merely track portions of the statute, are mere conclusions of the pleader and would allow the State to prove anything it desired to provide without properly apprizing the Defendant of the nature of the proof she (sic) is expected to meet upon trial of this case.

VI.

The Indictment alleges the Defendant did unlawfully, knowingly, make, present, and use a record and document (and sets out such document with knowledge of its falsity and with intent to affect the course and outcome of the said official proceeding) without specifying what portion of the order was false and what portion the Defendant had knowledge was false.

That to allege all of the methods to commit an offense without specifying actual method is a general pleading and not specific.

That alternative pleadings not specific will make it impossible to properly charge the jury.

That it would be a general charge and the jury could return a general verdict, thus depriving Defendant of due process and the right to know what he is charged with so to prepare his defense and to have a specific jury charge rather

than a general charge and a general verdict unsupported by specific evidence of wrongdoing.

WHEREFORE, PREMISES CONSIDERED, the defendant prays that the Court in all things grant Defendant's Motion to Quash and that Defendant be granted such other relief, both special and general, at law and in equity, to which he may be justly entitled.

Respectfully submitted,

By: /s/Kenneth E. Blassingame
KENNETH E. BLASSINGAME
STATE BAR NO.: 02472000
4111 N. Central Expressway, Suite 202
Dallas, Texas 75204
Phone: 214/520-7880
FAX: 214/521-3444
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Defendant's Motion to Set Aside Indictment was delivered to the District Attorney's Office at on October 30, 1997.

By: /s/Kenneth E. Blassingame
KENNETH E. BLASSINGAME
ATTORNEY FOR DEFENDANT

ORDER

On _____, 1997, came on to be considered Defendant's Motion to Set Aside the Indictment, and said Motion is hereby

(GRANTED) (DENIED - to which Defendant excepts).

SIGNED on the date set forth above.

_____

JUDGE PRESIDING

Appendix No. 13

FILED
97 NOV 4
A 8:58
BILL LONG
DISTRICT CLERK
DALLAS CO TEXAS

F96-02328-UM
And
F96-02329-UM

THE STATE OF TEXAS	§	IN THE 194TH DISTRICT COURT
VS.	§	OF
JAY S. FICHTNER	§	DALLAS COUNTY, TEXAS

MOTION TO DISMISS INDICTMENT
BECAUSE OF DOUBLE JEOPARDY
AND LACK OF MATERIALITY

TO THE HONORABLE JUDGE OF SAID COURT:

Jay S. Fichtner, Defendant, files this original motion to dismiss the indictment and in support hereof respectfully shows the following:

1. Subsequent to the time Paul R. Shunatona, the Complainant, filed charges with the district attorney, he filed a complaint with the State Bar of Texas, in which he made essentially the same charges that he made to the Dallas County District Attorney and upon which the indictment is based.

2. The rules of the State Bar of Texas have the same effect as the Texas Rules of Civil Procedure and have the force of law.

3. In accordance with the rules of the State Bar of Texas, Defendant appeared at a trial hearing where he was found not guilty of the charges made against him and was acquitted of such charges.

4. Having once been placed in jeopardy and having been acquitted of the same charges brought against him in the indictment before the bar, such indictment should be quashed.

5. None of the acts with which Defendant is charged was material within the meaning of the statutes under which the charges are made and the indictments returned.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that prior to trial of this cause the court schedule a pre-trial hearing of this motion and upon such hearing, that court (sic) dismiss the indictments; that Defendant be released from bond and discharged; and that Defendant have such other and further relief to which he may be justly entitled under the law.

Respectfully submitted,

/s/Kenneth E Blassingame
Kenneth E. Blassingame
Attorney at Law
4111 No. Central Expressway
Suite 202
Dallas, Texas 75204
Tel: 241-520-7880
FAX: 214-521-3444
Attorney for Defendant

CERTIFICATE OF SERVICE

A complete copy of the foregoing document was sent to Richard Reed, Assistant District Attorney, by U.S. Mail, postage prepaid on the 4th of November 1997.

/s/Kenneth E. Blassingame

Denied 12-01-97
/s/ Harold Entz

Appendix No. 14

FILED
97 NOV 4
A 8:58
BILL LONG
DISTRICT CLERK OF
DALLAS CO., TEXAS

F96-02329-UM

THE STATE OF TEXAS	§	IN THE 194TH DISTRICT COURT
VS.	§	OF
JAY S. FICHTNER	§	DALLAS COUNTY, TEXAS

MOTION TO DETERMINE MATERIALITY
AND
TO QUASH OR DISMISS INDICTMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Jay S. Fichtner, Defendant, files this motion to quash or dismiss the indictment in the above cause and to order the State to present its evidence that the alleged false statement allegedly made under oath was material

I. Indictment Charge.

The indictment charges that a while under oath, Defendant swore that a June 7th order did "not specifically instruct peace officers of their duty in the event they take the children into possession[,].

II. Grounds of Dismissal

A. The statement was not material.

1. Materiality is defined in §37.04 of the Penal Code as follows: (a) A statement is material regardless of the admissibility of the statement under the rules of evidence, i9f it could have affected the course or outcome of the official proceeding . . .(c) Whether a statement is material in a given factual situation is a question of law.

2. The statement was contained in a document that was part of a number of documents, contained in an Appendix of Exhibits, which was part of an application for leave to obtain a Writ of Mandamus and a Writ of Prohibition

3. The court refused to grant the application for leave to file the application.

4. The Application for Writ of Mandamus or Writ of Prohibition was never filed by the court.

5. The court having failed to grant the motion for leave to file a mandamus application and having failed to file the application for mandamus or writ of prohibition, itself, the documents contained in the Appendix of Exhibits were not material as a matter of law.

WEREFORE, PREMISES CONSIDERED, Defendant prays that prior to trial of this cause the court schedule a pre-trial hearing of this motion; require the State to present evidence of materiality of the statement charged to have been false; that the court render judgment that the statement or statements alleged by the State to have been false are not material; that the indictment in the above-entitled and numbered matter be quashed and dismissed; that Defendant be released from bond and discharged.

In the alternative, Defendant prays at time of trial that the court hold a hearing outside the presence of the jury of the State's evidence of materiality; that the court render judgment

that the statement or statements alleged by the State to have been false are not material; that the indictment in the above-entitled and numbered matter be quashed and dismissed; that Defendant be released from bond and discharged; and that Defendant have such other and further relief to which he may be justly entitled under the law.

Respectfully submitted,

/s/Kenneth E. Blassingame
Kenneth E. Blassingame
Attorney at Law
4111 No. Central Expressway
Suite 202
Dallas, Texas 75204
Tel: 214-520-7880
FAX: 214-521-3444
Attorney for Defendant

CERTIFICATE OF SERVICE

A complete copy of the foregoing document was sent to Richard Reed, Assistant District Attorney, by U. S. Mail, postage prepaid on the 4th of November 1997.

/s/Kenneth E. Blassingame

Exhibit No.15

Filed Dec. 4, 1997
Bill Long, Dist. Clerk
Dallas Co., Texas

F96-02329-UM

THE STATE OF TEXAS	§	IN THE 194TH DISTRICT COURT
VS.	§	OF
JAY S. FICHTNER	§	DALLAS COUNTY, TEXAS

OBJECTION TO COURT'S CHARGE TO THE JURY

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant in the above styled and numbered cause and files this his Objection to the Court's Charge to the Jury, and shows:

I.

The Court has denied Defendant's Motion to Determine Materiality as a Matter of Law and has stated "materiality is a mixed matter of law and fact."

II.

Further, the Court has charged the jury that materiality is a matter of fact. The Defendant objects to the Court charging the Jury that materiality is a matter of fact.

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully prays that this Honorable Court instruct the Jury that "Materiality is a Matter of Law".

/s/Kenneth E. Blassingame
Kenneth E. Blassingame
State Bar No. 02472000
4111 N. Central Expressway
Suite 202
Dallas, Texas 75204
(214)-520-7880
(214)-521-3444 FAX

185

Attorney for Defendant

Exhibit 16

Filed Dec. 4, 1997
Bill Long, Dist. Clerk
Dallas Co., Texas

F-96-02329-UM

Defendant objects to that part of the charge found on page 3 wherein the Court advises the jury, "whereas in truth and in fact certain allegations of fact contained in the said motion, etc." Said portion of the charge constitutes a comment by the court on the weight of the evidence, because there is direct, uncontradicted record evidence that the quoted portion of the motion for leave to file a writ of mandamus constitutes legal argument and not a statement of fact.

Respectfully submitted,

/s/Kenneth E. Blassingame

Denied at 12:30 p.m. the 4th day of Dec. 1999

Judge Harold Entz

Appendix No. 17

IN THE 194TH JUDICIAL DISTRICT
COURT OF DALLAS COUNTY, TEXAS

THE STATE	§	CAUSE NOS.
OF TEXAS	§	
	§	F96-92328-UM
VS.	§	
	§	F96-02329-UM
JAY SHELDON	§	
FICHTNER	§	

REPORTER'S RECORD

REQUESTED TRANSCRIPT - CHARGE HEARING

APPEARANCES:

Honorable John Vance, Criminal District Attorney
Crowley Criminal Courts Building
Dallas County, Texas
By: Hon. Rick Reed, A.D.A., SBOT #16686200
Hon. Grant Brenna, A.D.A., SBOT #00789170
For the State of Texas;

Honorable Ken Blassingame, Attorney at Law,
SBOT #02472000
Dallas, Dallas County, Texas

Honorable Henry Paine, Attorney at Law,
SBOT #15412600
Denton, Denton County, Texas
For the Defendant.

****

BE IT REMEMBERED that on the 4th day of December, A.D., 1997, the above entitled and numbered cause came on for trial before the Honorable F. Harold Entz, Jr., Judge of the 194th Judicial District Court, and a jury, and both the State and Defendant appearing in person and/or by counsel announced ready for trial; and all preliminary matters having been disposed of and proceedings had, the following facts were adduced in evidence, viz:

PROCEEDINGS

THE COURT: Charge hearing is being conducted in open court, in the presence of Counsel for both the State and the Defense, and Mr. Fichtner is present in court as well. Hearing is being conducted outside the presence and hearing of the impaneled jury. Obligated as I am, by Texas Penal Code Article 37.04(c), after hearing all of the evidence in the case as presented to the jury, I now find the document entitled, "Motion for Leave to File a Petition for Writ of Mandamus and Petition for Writ of Prohibition with Legal Authorities," as a matter of law was of such a nature and content that it had a direct and immediate connection with a material fact or facts

as to give weight to the sworn contents of the document presented to the members of the 5th District Court of Appeals for the State of Texas, located in Dallas County, Texas.

Close of Court finding with regard to this particular issue.

And, therefore, with great reluctance I find on the charge at 02329, obligated to present to the jury the last paragraph on page one. Though my judicial feelings being such that it is a comment on the weight of evidence gives me great trouble in having to charge as such. However, in light of *Rosenbaum* and other authorities I find no way out of my personal judicial dilemma in this regard. If this matter is brought to some appellate tribunal in the future I would welcome appellant judicial guidance for me personally and the other members of the trial bench and bar in this regard.

I assume the defense objects to that paragraph as a comment on the weight of the evidence.

MR. PAINE: Yes, Your Honor, the Defense does object, as the Court points out, the Defense objects that's a comment on the weight of the evidence. And we would further re-urge that a mistrial be declared in the aggravated perjury charge in that a hearing was not held prior to the impaneling and the seating of the jury on materiality, and that it's still the position of the defense that the State had the burden of proof to presenting this evidence to the court at a

hearing prior to the beginning of the trial, subject to a Motion for Materiality that the Defense filed.

THE COURT: Pursuant to –

MR. PAINE: – or in the alternative that the instructed verdict in this cause number be granted for the reasons previously stated.

THE COURT: Pursuant to that portion of *State v. Rosenbaum* found at 910 Southwestern 2d page 948, the opinion on "State's Motion for Rehearing," authored by Presiding Judge Mike McCormick, the Defense request is denied.

(Short recess taken.)

THE COURT: Continuation of this hearing: The Honorable Kenneth Blassingame has presented the Court a handwritten objection on a yellow legal pad, there being at this time of the proceedings, 12:30 p.m. no clerk in the Clerk's Office to put a file mark on the document about which I make reference, the Defense objection as contained in the document about which I make reference is overruled and as soon as a clerk comes back to the 194th District Court a file mark will be put on it, but I will prior to that file mark being put on it, in my own handwriting, write "Denied" with the date and time and my signature.

(Discussion off the record.)

MR. REED: I do have a matter I want to put on the record, if I may.

THE COURT: All right.

MR. REED: At this time the State would offer for purposes of this hearing State's Exhibits 17 and 18. State's exhibit 17 is a copy of a proposed charge for Cause Number F96-02329-UM. State's Exhibit 18 is a proposed charge for Cause Number F96-02328-UM. The charge, as I understand it, in the aggravated perjury cause currently includes a definition of the word "affidavit," the State offered - or the State would request that the Court charge the jury in accordance with State's Exhibit 17 and 18, which State's position is both of those proposed charges are correct statements of the law with regard to each cause. As far as the definition of affidavit is concerned, the State would - the State would call the Court's attention to case of *Airline versus State* at 721 Southwest 2d 348, it's a Court of Criminal Appeals decision from 1986, and as I understand the - the reasoning in that case, they took up the issue of whether or not the trial court had erred in failing to give a definition of the term reasonable belief in that case and they stated in there that the authority for giving such a definition was the fact that the legislature had defined that term in the Penal Code and that they reasoned that the legislature intended for the jury to be informed of its own definitions for words and phrases used in the Penal Code.

There is – there is some other language in the opinion, but as I understand the law, the law does – the law requires the court essentially to charge the jury on terms that have been defined in the Penal Code, but in terms – but with regard to terms that are matters of ordinary everyday usage which have not been given specific definitions in the Penal Code that the court has no – is under no obligation to give such charges and I further would point out to the court that the term affidavit is no where found as I recall in the definition of perjury or aggravated perjury in the Penal Code. The term does appear in the – in the indictment simply as a descriptive word to refer to the verification page which is contained in State's Exhibit 1. And it's the State's position that for that reason the – and for the further reason that the verification itself refers to the – the document itself refers to it as an affidavit, and there was testimony that it was in fact an affidavit, there is no legitimate reason to charge the jury on a definition that comes out of a civil case *Brownley versus Brownley, decided by the Supreme Court of Texas. State's position that that definition has no bearing and is not binding on this jury and that it's potentially misleading and prejudicial to the State's case in this matter. And I would further advise the Court that based upon my review of the two proposed charges, Exhibit 17 and 18, I believe that otherwise they are a – they are substantially the same as the Court's charge as it presently reads.*

THE COURT: The charges that I before me do not contain the definition of affidavit which I had understood that we had included last night, do you find them –

MR. REED: You may be looking at the ones I gave you earlier, Judge.

MR. PAINE: We haven't gotten anything yet. The ones we had that we worked on had -

(Reporter hands out copies of charge.)

THE COURT: The State's objection and alternative request is denied. Affidavit will be put in the Court's charge.

Darline, here.

(Recess.)

THE COURT: This hearing is being held outside the presence and hearing of the jury panel, this hearing is being called at the request of Counsel, Henry Paine, in behalf of the defendant.

MR. PAINE: May I proceed, Your Honor?

THE COURT: You may.

MR. PAINE: Thank you, Judge. Judge, the Defendant would object to the Court allowing the jury members to take any notebooks back into the jury room during deliberations. The basis for our objection would be Texas - among other things, that we just think it's not the right thing to do, but a little better objection might be on the Texas Rules of Appellate

Procedure, Rule 21.3 F, that after retiring to deliberate if the jury receives other evidence, it could be a ground for a new trial. And it's our - the position of the Defense, Judge, if a juror misheard evidence and wrote it down incorrectly in a notebook, and another juror then gets into a discussion with that juror concerning what the evidence was and they read what they wrote down and it's not in the official record which constitutes the only evidence in this case, that that would amount to hearing or receiving other evidence, and on those grounds we object to taking any notebooks back in the jury room.

THE COURT: The Court will stand on its previous ruling of *Price v. State*, however there is a charge that is omitted with regard to notes being taken which I will ask Mrs. King to put into the - each of the charges at this time.

MR. REED: Your Honor, before we go off the record, if I may I would like to apprize the Court that the State wholeheartedly agrees with the Defendant's position on this matter, and we join the defendant in that motion.

THE COURT: The request of both the State and the Defense are denied.

(Recess.)

THE COURT: Does either side have any objection to the Court just reading the burden of proof one time.

MR. REED: No, sir.

THE COURT: The State have any objection reading it one time.

MR. REED: No, sir, as long as it's referred to them that it's in both charges.

MR. PAINE: Before they come in, I'd like to make one final objection, Judge.

THE COURT: Yes.

MR. PAINE: Sir, are you taking objections on the Court's charge at this time?

THE COURT: Whatever you care to offer, Mr. Paine.

MR. PAINE: Judge, Defense would object to the Court's charge in Cause Number F96-02329-UM, specifically we would object to including the language, "a statement is material if it could effect the course or outcome of the official proceeding. Concerning the issue of materiality you are hereby instructed that the defendant made the statement that the allegations of fact contained in those proceedings are true and correct as alleged and within the context alleged in the indictment, such statements was a matter of fact - matter of law material." We object this is a comment on the weight of the evidence by the Court. Secondly, in the alternative we would ask that the Court charge the jury as to what

specifically this language refers to in regards to the materiality in light of the indictment. In other words, it's the position of the Defense that this language, as alleged - that the language, "that the allegations of fact contained in these proceedings are true and correct," it hasn't shown how it's material. And if the Court is going to give a charge that they are in fact material, we would urge that the Court instruct the jury as to how the Court believes that they are material and in what aspects they are material as a matter of law. Which at that time we would, of course, as that being a comment on the weight of the evidence. This would be a - We would ask in the alternative if the Court does not remove that language, to include that language.

THE COURT: The defense objection is well taken, however the Court denies the defense request. The charge will stand as it presently exists.

MR. PAINE: And in light of the Court's previous ruling denying the Defense's request that the notebooks not be taken back into the jury room, we would ask that the Court examine each and everyone of the notebooks in camera prior to releasing them to the jury so that the Court can make a determination there is no incorrect notes that are in deviation from the evidence that came from the witness stand.

THE COURT: The Court declines to accept Counsel's request.

MR. PAINE: And in the alternative to that, Your Honor, we would ask that the notes be included as part of the records in this case, that the Court take up the notebooks at the conclusion, and that all notes be preserved and included as part of the appellate record should one be necessary.

THE COURT: Pursuant to *Price v. State,* the request is denied.

MR. REED: Judge, for the record I would like to formally offer State's Exhibits 17 and 18 into evidence for purposes of the record only.

THE COURT: Admitted for purpose of the record. Likewise State's Exhibit Number 1 is by the Court admitted in its entirety, it may be published and considered by the jury.

Sheriff, will you bring in the jury, please.

MR. PAINE: Your Honor, we would also request that the notebooks be attached as part of the record, as a Bill of Exception to the Court's ruling.

THE COURT: Request denied.

THE BAILIFF: All rise.

THE COURT: Let the record reflect the jury is returning to the courtroom at this time.

(End of requested transcription.)

Reporter's Certificate

STATE OF TEXAS:
COUNTY OF DALLAS:

I, Darline W. King, Official Court Reporter of the 194th Judicial District Court, in and for Dallas County, Texas, do hereby certify that the foregoing volume constitutes a true, complete and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in the partial statement of facts, in the above styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

Witness my hand this the 4th day of March, A.D., 1999.

/s/
Darline W. King
Official Court Reporter
194th Judicial District Court
Dallas County, Texas
(214) 653-5803

Certification No. 1064 expires December 31, 2000

Exhibit 18

STATE OF TEXAS
vs. No. _____

Date of Order	Orders of Court
Nov. 8 1997	Pretrial hearing - Request that prosecutor be disqualified - Denied
Dec 1 1997	Witness sworn in: Martinson, Anita
Dec 1 1997	See F-96-02328-UM - /s/HE
Dec 2 1997	" " " " - /s/HE
Dec 2 1997	" " " " - /s/HE
Dec 4 1997	" " " " - /s/HE
	Verdict
Dec (?) 1997	Hung jury - Jury discharged - /s/HE
12597	12-12-97
12/12/97	Case Dismissed on Motion of District Attorney/Richard Reed Approved - Harold Entz, Judge

Exhibit 19

Defendant Fichtner, Jay Sheldon W/M 1-23-26 Charge Aggravated Perjury Address 4851 LBJ Frwy., Ste. 207, Dallas TX 85244 Location On Bond Filing Agency DA/SCD Date Filed 12-05-97 Court 194th Judicial District Court Complainant Shunatona, Paul R.
C/C %97-03659 Reindictment

TRUE BILL OF INDICTMENT

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS: The Grand Jury of Dallas County, State of Texas, duly organized at the October term, A.D., 1997, of the Criminal District Court No. 4 of Dallas Count, in said court at said term, do present that

JAY SHELDON FICHTNER, defendant

on or about the 14th day of June, A.D., 1996, in said County and State, did unlawfully, make a false statement under oath and swear to the truth of a false statement previously made, with intent to deceive and with knowledge of the statement's meaning, in a document entitled **Verification** attached to and incorporated in a document entitled MOTION FOR LEAVE TO FILE A PETITION FOR WRIT OF MANDAMUS AND PETITION FOR WRIT OF PROHIBITION WITH LEGAL AUTHORITIES, filed in the Court of Appeals for the Fifth District of Texas, under Docket No. 05-96-00890-CV in

proceeding entitled PAULA M. CRANK V. HONORABLE BOB O'DONNELL, JUDGE, 301ST JUDICIAL DISTRICT COURT OF DALLAS COUNTY, TEXAS AND KATHERINE W. CRANK, to wit: "that the fact contained in these proceedings are true and correct," whereas in truth and in fact certain fact contained in the said motion, to wit: That the June 7th Order for Issuance of Writ of Attachment "does not specifically instruct peace officers of their duty in the event they take the children into possession" and that the said order "reads: *deliver the children safely to [this court during regular court orders] [Katrina Crank instanter],*" were not true and correct, and the said statement, to wit: "that the allegations of fact contained in these proceedings are true and correct," was a statement that was required and authorized by law to be made under oath, and the said false statement was material and was made during and in connection with an official proceeding, to wit: a proceeding filed in the Court of Appeals for the Fifth District of Texas, under Docket No. 05-96-00890-CV, entitled PAULA M. CRANK V. HONORABLE BOB O'DONNELL, JUDGE, 301ST JUDICIAL DISTRICT COURT OF DALLAS COUNTY, TEXAS AND KATHERINE W. CRANK against the peace and dignity of the State.

/s/ Anthony Williams
Foreman of the Grand Jury

John Vance
Criminal District Attorney of
Dallas County, Texas

[Filed Stamped]: *Dec 11 1997*

Appendix No. 20

FILED
Mar 4 1999
Jim Hamlin
DISTRICT CLERK
DALLAS CO TEXAS

F97-03659-KM

THE STATE OF TEXAS	§	IN THE 194TH DISTRICT COURT
VS.	§	OF
JAY S. FICHTNER	§	DALLAS COUNTY, TEXAS

MOTION TO DISMISS INDICTMENT AS BEING UNCONSTITUTIONAL

TO THE HONORABLE JUDGE OF SAID COURT;

COMES NOW JAY SHELDON FICHTNER, hereafter Defendant, and moves the Court to dismiss this indictment brought against him for violation of Texas Penal Code Ann: §37.04 (Vernon 1994). Appellant would specifically show that the provisions of Subsection C of the foregoing, to wit: "whether a statement is material in a given factual situation is a question of law", is unconstitutional as applied to

Defendant, and in support thereof would show the Court the following:

I.

Defendant's previous trail in this matter resulted in a hung jury which was discharged by the trial court. During that proceeding, the Court instructed the jury that "statement means any representation of fact. A statement is material if it could have affected the course or outcome of the official proceeding. Concerning the issue of materiality, you are instructed that if the Defendant made the statement, that the allegations of fact contained in these proceedings are true and correct as alleged and within the context alleged in the indictment such statement was, as a matter of law, material."

II.

In order to establish aggravated perjury, the State was required to prove that Defendant, (1) with intent to deceive and (2) with knowledge of the statement's meaning (3) made a false statement under oath, (4) that was required or authorized by law to be made under oath, (5)in connection with an official proceeding and (6) that the false statement was material. Texas Penal Code Annotated §37.02-03; *McQellar v. State*, 696 S.W.2d 579, 581 (Tex.Crim.App. 1985). It is therefore clear that under State law, this Court is required as a matter of law to establish the element of materiality and to so instruct the jury by statutory mandate and precedent. In fact, in furtherance of the statutory scheme, such a charge was given over Appellant's objections to the first jury which tried Appellant. Appellant submits that the action of the trial court and the Legislature deprived him of the jury of his selection.

III.

It has long been held that the Due Process Clause protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *Sanstorm v. Montana*, 442 U. S. 510, 520, 99 S.Ct. 2450, 2457, 61 L.Ed.2d. 39 (1979). *Sanstorm* differentiated between permissive inferences, which do not violate a defendant's due process rights, and conclusive presumptions or burden-shifting presumptions, which do. Under the foregoing authorities, Appellant specifically objects to the instruction previously given by the trial court in this case and to the statutory commandment that the court do so. Such instruction is a conclusive presumption and shifts the burden of proof to Appellant. See Sanstorm v. Montana, supra.

In *United States v. Gaudin*, 115 S.Ct. 2310 (1995), the Supreme Court held that both the Fifth and Sixth Amendments require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged. In that case, the Government conceded that materiality was an element of the offense that the Government must prove under 18 U.S.C. §1001. Resolving a split among the various Federal Circuit Courts, the Supreme Court held that the question of "materiality" is a mixed question of law and fact, requiring a jury determination of that element in order to comply with the due process requirements of the Fifth and Sixth Amendments

to the United States Constitution. Justice Scalia, in delivering the opinion of the Court commented that: "The Fifth Amendment to the United States Constitution guarantees that no one will be deprived of liberty without 'due process of law' and that the Sixth that 'in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury.' We have held that these convictions require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. *Sullivan v. Louisiana*, 508 U.S. 275, 277-278, 113 S.Ct. 2078, 2080-2081, 124 L.Ed.2d 182 (1993)."

The Court further held that: "The right to jury trial includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of guilt." *Ibid.*, 2316. Further, the Court flatly held that "The trial judge's refusal to allow the jury to pass on the 'materiality' of Gaudin's false statements infringed upon that right." *Ibid.*, 2320. Justice Rehnquist, concurring in *Gaudin* noted that the issue of whether or not "materiality" was an element under 18 U.S.C. § 1001 is not at all obvious from its text. The notion of materiality to that statute was a judge-made limitation and not a statutory mandate.

No such result obtains in this case sub judice. Defendant is charged under a statute which is unconstitutional on its face and as applied to him personally. Defendant submits that if the question were simply a principle of *stare decisis*, this Court

could put him to trial and properly instruct the jury under the mandate of *Gaudin*. However, the statute which charges Appellant clearly requires an unconstitutional instruction be given by the trial court in violation of Defendant's Fifth and Sixth Amendment rights under the United States Constitution. Defendant concedes that under the "structural error" analysis of the Supreme Court in *Arizona v. Fulminante*, 499 U.S. 279, 306, 111 S.Ct. 1246, 1263, 113 L.Ed.2d 302 (1991), the court has subjected jury instruction plagued by Constitutional error to the harmless error analysis. *U.S. v. Gaudin, supra* at p. 2321. However, Defendant, under the instruction given against him in this case and to which he would be subjected in any future trial under the foregoing statutory provisions constitutes an erroneous shifting of the burden of proof which is structural error and not subject to a harmful error analysis. See *Sullivan v. Louisiana*, 508 U.S. 275, 280-282, 113 S.Ct. 2078, 2082-2083, 124 L.Ed.2d 182 (1993). Defendant submits that the giving of the instruction by the trial court was structural in nature. *Ibid.* Defendant cannot expect due process when he is tried under a statute which mandates the court violate his Fifth and Sixth Amendment due process expectations.

III.

Defendant submits that he should not be subjected to a retrial on the merits in the case sub judice. The trial court, by following the law and precedents in Texas Committed structural error in the case. Appellant has already selected a jury of his peers in which he entrusted his fate. To force Appellant to impanel a second jury to proceed in the same manner under a constitutionally-flawed statute would be

subjecting him to twice being prosecuted for the same offense. Defendant believes he could never pick a jury which would overcome the burden-shifting presumption mandated by the Texas statute. Therefore, this Court should hold § 37.04, Texas Penal Code unconstitutional as applied to him. *Bonilla v. State*, 933 S.W.2d 538(Tex.App.-Hous.(1 Dist. 1996), opinion of Justice Cohen concurring to order overruling motion for rehearing: "I agree with Appellant that Tex. Penal Code Ann. § 3704(c) (Vernon 1994) is unconstitutional for the reasons stated in *United States v. Gaudin*. . .citations omitted. Thus, the jury instruction here was unconstitutional for the same reasons as the instruction in *Gaudin*. Trial judges should no longer instruct judges (*sic*) that materiality is a question of law. Instead, they should instruct juries that materiality, like other elements, must be proved by the State beyond a reasonable doubt. Tex. Penal Code Ann. 2.01 (Vernon 1994)."

It is noted that the court in *Bonilla* refused to consider a new ground raised under the *Gaudin* decision for the first time on a motion for rehearing. Likewise, United States Court of Appeals for the Fifth Circuit refused to apply a reversible error analysis because the defendant did not posit a due process objection to the District Court's instruction, which instruction was an accurate articulation of controlling Fifth Circuit at the time the law was given to a *Gaudin*-type error. The Court instead employed the plain error standard of review. See *U. S. v. Waldron*, 118 F.3d 369, 370 (5th Cir. 1997).
Defendant believed both of these courts erred for the reasons stated in his structural error arguments, ante.

WHEREFORE, PREMISES CONSIDERED, Defendant hereby objects to the constitutionality of the statute under which he is charged, objects to the tr4ial court's following the statutory mandate that it alone determine the issue of materiality as a matter of law, and urges the Court to dismiss the indictment against him as being unconstitutional on its face and as applied to him personally.

RESPECTFULLY SUBMITTED,

/s/Edgar a. Mason
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KENNETH BLASSINGAME
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4111 N. Central Expressway
Suite 202
Dallas, Texas 75204
214-520-7880
FAX: 214-521-3444

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of March 1999, a true and correct copy of the above and foregoing Motion was delivered to Clark Birdsall, Assistant District Attorney of Dallas County, Texas, 133 N. Industrial Blvd., Dallas, Texas 75207

/s/Ed Mason
EDGAR A. MASON

ORDER

DENIED
SIGNED March 8, 1999 /s/Robert D. Dohoney, Judge

Appendix No. 21

Cause No. F97-0369 KM

THE STATE OF TEXAS	IN THE 194TH
V.	DISTRICT COURT
J. S. FICHTNER	DALLAS COUNTY, TEXAS

[Ed. Note: Stamped: FILED
Mar. 11, 1999
Jim Hamlin, District Clerk
Dallas Co., Texas
D K Deputy

PLEA BARGAIN AGREEMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now Defendant, Counsel for Defendant, and Counsel for State herein and would show that a plea bargain agreement has been entered into between the undersigned, and that under the terms of said agreement both sides agree they will waive their right to a jury trial and agree to and recommend the following:

Defendant will plead X guilty _____ nolo contendere

Defendant will testify X will not testify _____

_____ confinement in Penitentiary for ____ years.

_____ confinement in [state jail] [county jail] for _____ (days) _____ {years}.

_____ fine $300

X PROBATION TO BE GRANTED FOR 1 years subject to all the terms and conditions imposted by the trial court. Further, the judge, as provided by Article 42.12, Sec. 11 & 15 V.A.C.C.P., may at any time during the period of probation alter or modify the conditions.

_____ confinement in {State Jail) (County Jail) for - 0 - days as a condition of Probation.

_____ supervised work or community service for ___ hours as required by Article 42.12, Sec. 16, V.A.C.C.P.

_____ SHOCK PROBATION TO BE GRANTED _____ days after sentence, subject to good behavior of defendant in the Penitentiary.

_____ participation in SPECIAL ALTERNATIVE INCARCERATION PROGRAM.

Conviction to be as follows:

_____ Felony X Misdemeanor

_____ Non-conviction Deferred
_____ Probation _____ Restitution

_____ No credit for back time served.

Defendant's back time date is: _____

Additional provisions of this agreement are: Case reduced to misdemeanor; Δ to surrender his bar license immediately, Cause No. F96-02328 UM dismissal. Resign from practice of law in lieu of discipline and surrender bar license and card. The undersigned certify they have read the terms of the above agreement and that it fully contains all the provisions of said agreement.

JOHN VANCE
DISTRICT ATTORNEY
DALLAS COUNTY, TEXAS

/s/Jay S. Fichtner
Defendant

By /s/[Initial - not readable]
Assistant District Attorney
[not readable] for Birdsall

/s/Ed Mason
Counsel for
Defendant

If a victim impact statement has been returned to the State, a copy of said statement shall be turned over to the Court by the State's attorney prior to the Court's acceptance of this plea.

/s/Robert D. Dohoney, Judge

Appendix No. 22

NO. F97-03659-KM

THE STATE OF TEXAS	§	IN THE 194TH DISTRICT COURT
VS.	§	OF
JAY S. FICHTNER	§	DALLAS COUNTY, TEXAS

DEFENDANT'S MOTION TO RETRACT
PLEA BARGAIN AGREEMENT OF 3/11/99

TO THE HONORABLE JUDGE OF SAID COURT:

JAY S. FICHTNER, Defendant, files this motion to retract and revoke and notice of retraction and revocation of plea bargain agreement signed on 3/11/99 in support of which Defendant shows the following:

1. Defendant did not sign the agreement voluntarily, but under duress and while in an emotionally stressful state. Defendant did not fully understand the implications of his agreement, without limitation, including the reference to probation.

2. Defendant signed the agreement, because he was told that K.A.C., an 11 year old child, was going to be

permitted by the court to testify that she had suffered sexual abuse from a half-brother. The district attorney falsely represented to the court that the alleged sexual abuse occurred in Defendant's former client's home in Garland, Texas.

3. The evidence to be given by K.A.C. would have been false and fraudulent, but Defendant was falsely and fraudulently induced to sign the agreement and relied upon representations made to him that unless he entered into a plea bargain agreement, the evidence would be heard by the jury. Defendant was told that the child's testimony would be devastating and would so affect the minds of the jury that they could not render a just and fair verdict on charges of perjury and tampering with a public document, which were the charges faced by the Defendant.

4. Since signing the plea agreement, Defendant has learned that if sexual abuse of K.A.C. in fact had occurred, which is refuted by an overwhelming weight and preponderance of evidence, it did not occur in Defendant's client's home, but in Collin County, Texas, the home of her former husband. The weight and preponderance of evidence to which Defendant makes reference exists in Dallas County, Texas,

and was reasonably and adequately available to be presented in court had the court granted time to obtain it.

5. Defendant denies any criminal wrong-doing. He did not commit perjury, and he did not tamper with a public document.

6. The District Attorney did not present evidence during the trial nor at the plea bargain hearing that Defendant committed perjury or that Defendant had tampered with a government document.

7. The plea bargain agreement is void or voidable.

8. The court's judgment based upon the agreement is in material variance with its terms. The signed document does not contain an agreement that would subject Defendant to jail, but the court's order provides for 1 year in jail.

9. The agreement is unconscionable, excessive and constitutes over-reaching by the State of Texas. Defendant was placed in a state of fear and under the belief that the court was going to allow an 11 year old child to testify to

falsehoods, but would not allow adequate time or a reasonable opportunity to prepare and present a defense to the testimony, which reasonably would have required that Defendant call expert witnesses and personnel from the Department of Regulatory and Protective Services.

10. Defendant was surprised by the State's announcement after trial had commenced that it would, present testimony from K.A.C., and tender of such witness on such short notice was in direct disobedience of a pre-trial order of this court that required at least 7 days prior notice of such testimony. Defendant's counsel requested additional time, but Defendant was told that the request was denied.

11. Defendant retracts, revokes and to the extent provided by law rescinds his plea bargain agreement and his plea of guilty to misdemeanor perjury.

WHEREFORE, PREMISES CONSIDERED, moves the court to permit Defendant to withdraw his plea bargain agreement and plea of guilty and prays that he have such other legal and equitable relief to which he is entitled under the law.

Respectfully submitted,

/s/Jay S. Fichtner
Jay S. Fichtner
Bar No. 0695300
14901 Quorum Dr., Suite 740
Dallas, Texas 75240
Tel.: (972) 404-9991
Fax: (972) 404-9994

CERTIFICATE OF SERVICE

On the 12th day of April, 1999, a copy of the foregoing pleading was placed in the U. S. Postal Service, postage prepaid to Clark Birdsall, Assistant District Attorney of Dallas County, Texas, 133 N. Industrial Blvd., Dallas, Texas 75207.

/s/Jay S. Fichtner

Appendix 23

NO. F97-03659-KM

THE STATE OF TEXAS	§	IN THE 194TH DISTRICT COURT
VS.	§	OF
JAY S. FICHTNER	§	DALLAS COUNTY, TEXAS

DEFENDANT'S MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

JAY S. FICHTNER, Defendant, files this motion for judgment in the above entitled matter and as grounds therefor he respectfully shows the following:

I. A material and fatal variance exists between the terms of the *Plea Bargain Agreement* and court's judgment.

II. The state failed to introduce evidence into the record showing the guilt of defendant, in violation of the provisions of rule 1.15, *Code of Criminal Procedure*, which provides, *in no event shall a person charged be convicted without sufficient evidence to support the same.*

III. Defendant's signature to the *Plea Bargain Agreement* was not voluntarily but was obtained under duress, during extreme emotional stress and without adequate information about the consequences of the plea.

IV. During trial of the case, private conferences were held at the bench among the court and attorneys. They were not heard or recorded by the court reporter and therefore are not part of the record. They were conducted outside defendant's hearing, who was not invited on even one occasion to hear or participate in the conferences. The defendant was deprived of a fair trial in violation of 14th,4th, 5th, 6th amendments to the U.S. Constitution and art. 1, §10 of the Texas Constitution.

V. Denial of Defendant's *Motion to Dismiss Indictment as Being Unconstitutional*, which was filed and heard prior to trial.

VI. Denial of motion to dismiss indictment because of double jeopardy denied on 12/1/97.

VII. Newly discovered evidence that the testimony of K.A.C., a child, was false. The testimony was crucial to Defendant's agreement to enter into a plea bargain. She gave perjured testimony. K.A.C. has a history of telling falsehoods. See affidavits of Paula M. Crank and Andrea L. Benners, which are attached and incorporated.

VIII.State violated defendant's rights to a fair trial, by surprising Defendant, when the State failed to comply with the trial court's order made before commencement of trial on 12/1/97, by failing to provide reasonable notice to Defendant before trial of the State's intention to use the following T.R.E. 404(B) material:

A. Testimony of K.A.C., a child.
B. Testimony of Rhonda Hughes Wilson Montee
C. Lynn Cherry
D. Tom Barr

IX. There is no probative evidence in the record to prove beyond a reasonable doubt that the defendant knew on June 14, 1996, that the document submitted to the court of appeals had not been signed by a district judge, and therefore, Defendant could not have formed the requisite intent to deceive.

X. There is no probative evidence in the record that the defendant had knowledge that the document submitted to the court of appeals on June 14, 1996, had not been signed by a district judge on June 7, 1996, and therefore, defendant could not have formed the requisite intent to deceive.

XI. There is no probative evidence in the record that the course or outcome of an official proceeding could have been affected by the defendant's statement that the

document presented to the court of appeals on June 14, 1996, was true to his best information and belief.

XII. There is no probative evidence in the record to prove beyond a reasonable doubt that the course or outcome of an official proceeding could have been affected by the defendant's statement that the document presented to the court of appeals on June 14, 1996, was true to his best information and belief.

XIII. There is no probative evidence in the record to prove beyond a reasonable doubt that defendant's statements to the court of appeals on June 14, 1996, were more than the defendant's legal construction of a written document.

XIV. There was no probable cause, *ab initio,* for the indictment, which should have been quashed.

XV. The court erred on or about 12/1/97, which was prior to the commencement of trial, in denying Defendant's motion to set aside the indictment, because the state moved to set aside the indictment on 12/12/97, and the court granted the state's request without notice to the defendant.

XVI. The state violated the court's order of 12/1/97, prior to commencement of trial, by failing to provide the following documents or information to the defendant:

A. All statements made by any witness to the alleged offense in the possession or knowledge

of the district attorney or any of his agents. . .which might in any manner be material to guilt or innocence of the defendant or to punishment. . . (#5).

B. All handwritten and typed notes of police officers or Department of Protective and Regulatory Services or child advocacy employees who investigated and participated in any manner in this case or a Department of Protective and Regulatory Services case arising from the same events. (#11).

C. The prior criminal records of each of the state's witnesses. (#13).

D. Prior criminal records of all informants. (#16).

XVII. The State violated the court's order of 12/1/97 that granted the Defendant's *Motion for Production of Witness Statements and Writings Used to Refresh the Recollection of Witnesses* by calling K.A.C., the child, and others, which caught the Defendant by surprised and prevented the Defendant from having the opportunity to prepare his case. The Defendant was denied his right to a fair trial in violation of the 4th, 5th, 6th, and 14th amendments to the U. S. Constitution.

XVIII. The court erred in failing to sustain Defendant's motion to quash the indictment on grounds of double jeopardy, because in the first trial of this case the court instructed the jury that the issue of materiality was one for the court to decide, and it instructed the jury that the defendant's statements to the court of appeal on June 14, 1996, were material. Although the jury could not arrive at a verdict, the defendant was placed in jeopardy, and if the court had not instructed the jury on the issue of materiality, there might have been a *nōt guilty* verdict.

WHEREFORE, PREMISES CONSIDERED, the defendant prays for the following relief:

A. That the court quash the indictment and discharge the defendant;
B. In the alternative that the court grant a new trial in this matter;
C. That the court hear evidence in support of this motion for new trial;

D. That the court grant such other and further relief, both special and general, legal and equitable, to which the defendant may be justly entitled under the law.

Respectfully submitted,

/s/Jay S. Fichtner
Bar No. 0695300
14901 Quorum Dr., Suite 740
Dallas, Texas 75240
Tel.: (972) 404-9991
Fax: (972) 404-9994

CERTIFICATE OF SERVICE

On the 10th day of April, 1999, a copy of the foregoing pleading was placed in the U. S. Postal Service, postage prepaid to Clark Birdsall, Assistant District Attorney of Dallas County, Texas, 133 N. Industrial Blvd., Dallas, Texas 75207.

/s/ Jay S. Fichtner

ORDER

The above Motion for New Trial is DENIED.

SIGNED May 24, 1999.

/s/Robert D. Dohoney, Judge

Appendix 24

NO. F97-03659-KM

THE STATE OF TEXAS	§	IN THE 194TH DISTRICT COURT
VS.	§	OF
JAY S. FICHTNER	§	DALLAS COUNTY, TEXAS

DEFENDANT'S MOTION FOR JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Subject to his motion to disqualify Hon. Robert Dohoney, Defendant respectfully moves the court to enter judgment dismissing the indictment, in support of which he shows the following:

A. There is no evidence in the record or in the alternative there is no evidence beyond a reasonable doubt that the State proved each the elements of perjury.

B. There is no evidence or in the alternative there is no evidence beyond a reasonable doubt that Defendant's affidavit to the court of appeals was false.

C. As a matter of law, Defendant's verification of the proposed order drafted and delivered to Defendant by Paul Shunatona was upon information and belief, and thereby was not an unqualified affidavit, as required by the Texas perjury statute.

D. There is no evidence that between June 7, 1996, and June 14, 1996, Defendant obtained knowledge of the contents of the order signed by Hon. Bob O'Donnell on June 7, 1996, and therefore, there is no evidence that Defendant could have formed an intent to mislead the court of appeals, as required by the Texas perjury statute.

E. There is no credible, material, relevant evidence that Defendant's representation to the court of appeals could have affected its proceedings.

F. The overwhelming weight and preponderance of the evidence is that Defendant's affidavit before the court of appeals could not have and did not affect the trial court proceedings.

G. The perjury statute, in so far as it requires the trial court to determine the element of

materiality as a matter of law, is unconstitutional as violative of the 5th and 6th amendments to the U. S. Constitution.

H. Because the court charged the jury as to *materiality* in the first jury trial, Defendant has been subjected to double jeopardy.

I. Defendant and the State of Texas did not agree upon the terms of the plea bargain agreement of March 11, 1999, and therefore, the court cannot *sign a judgment in conformity with the plea bargain approved by Judge Dohoney and the judgment pronounced by him in open on March 11, 1999.*

WHEREFORE, PREMISES CONSIDERED, Defendant prays that he be granted oral argument of this motion and upon hearing of this motion that Hon. Robert Dohoney be disqualified from taking further action in this cause, except to request that the Court of Appeals for the 5th District of Texas in Dallas excuse him from taking further action in this cause. Defendant prays for such other and further relief, both special and general, legal and equitable to which it may be justly entitled.

Respectfully submitted,

/s/Jay S. Fichtner
Jay S. Fichtner
14901 Quorum Dr., Suite 740

Dallas, Texas 75240
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CERTIFICATE OF SERVICE

On the 4th day of October, 2000, a copy of the foregoing pleading was placed in the U. S. Postal Service, postage prepaid to Hon. John Ovard, Presiding Judge, First Administrative District, Frank Crowley Courts Building, 133 N. Industrial Blvd., Dallas, Texas 75207 and Patricia Poppoff Noble, Assistant District Attorney of Dallas County, Texas.

/s/Jay S Fichtner

Appendix 25

NO. F97-03659-KM

THE STATE OF TEXAS	§	IN THE 194TH DISTRICT COURT
VS.	§	OF
JAY S. FICHTNER	§	DALLAS COUNTY, TEXAS

DEFENDANT'S MOTION
TO DISQUALIFY
HON. ROBERT DOHONEY

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant respectfully moves to disqualify Hon. Robert Dohoney from taking further action in this matter and in support hereof respectfully shows the following:

1. Following a 1st trail in this cause, Hon. Harold Entz, the elected and sitting judge of the 194th Judicial District Court recused himself.

2. Without following the procedures prescribed in Rule 18a, *Texas Rules of Civil Procedure,* Hon Harold Entz assigned Hon. Robert Dohoney to conduct and preside over a second trial.

3. On or about March 11, 1999, with Hon. Robert Dohoney presiding, Defendant and the State of Texas signed a plea bargain agreement, and on March 12,1 1999, Hon. Harold Entz signed a judgment of conviction.

4. Defendant appealed said judgment, and on September 21, 2000, the Court of Appeals for the 5th District of Texas ruled that said judgment is void. The court of appeals has abated Defendant's appeal and ordered, *Hon. Robert Dohoney to sign a judgment in conformity with the plea bargain approved by Judge Dohoney and the judgment pronounced by him in open court on March 11, 1999.*

5. Defendant respectfully submits that Hon. Robert Dohoney does not have the power, right, authority or jurisdiction to sign a judgment in this cause, because he was not duly, procedurally or substantively appointed by the Presiding Judge of the 1st Administrative District to act in the above entitled and numbered cause.

6. Furthermore, the court of appeals has ruled in this case that *A judge may not take **any** action in a case after he recuses himself* (emphasis added), which is now the law of this case. Judge Entz's assignment of Judge Dohoney to hear this case is just as void as the judgment signed by Judge Entz on March 12, 1999.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that he be granted oral argument of this motion and upon hearing of this motion that Hon. Robert Dohoney be disqualified from taking further action in this cause, except to request that the Court of Appeals for the 5th District of Texas in Dallas excuse him from taking further action in this cause. Defendant prays for such other and further relief, both special and general, legal and equitable to which it may be justly entitled.

Respectfully submitted,

/s/Jay S. Fichtner
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